

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

No. 11-30189

Plaintiff-Appellee,

vs.

D.C.No.9:11-cr-00008-DWM-1
U.S. District Court for
Montana, Missoula

WILLIAM RICHARD NIELSEN,

Defendant-Appellant.

Taken at the Russell Smith Courthouse
Missoula, Montana
Tuesday, July 19th, 2011 at 10:32 a.m.

TRANSCRIPT OF APPEAL
Pages 1-106

Heard before the Honorable Donald W. Molloy
United States District Judge
District of Montana

A P P E A R A N C E S

CYNDEE L. PETERSON, Assistant United States Attorney, of
the Office of the United States Attorney, 105 East Pine
Street, Missoula, Montana 59801,
appearing on behalf of the Plaintiff-Appellee.

MICHAEL DONAHOE, Esq., of the Federal Defenders of
Montana, 50 West 14th Street, Suite 300, P.O. Box 250,
Helena, Montana 59624,
appearing on behalf of the Defendant-Appellant.

Reported by Julie M. Lake, RDR, CRR, CSR
Registered Diplamate Reporter
Certified Realtime Reporter

Proceedings recorded by mechanical stenography,
Transcript produced by computer.

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, MISSOULA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WILLIAM RICHARD NIELSEN

Defendant.

D.C. No. 9:11-cr-00008-DWM-1

Taken at the Russell Smith Courthouse
Missoula, Montana
Tuesday, July 19, 2011 at 10:32 a.m.

TRANSCRIPT OF SENTENCING

Heard before the Honorable Donald W. Molloy
United States District Judge

A P P E A R A N C E S

CYNDEE L. PETERSON, Assistant United States Attorney, of
United States Attorney's Office, 105 East Pine Street,
Missoula, Montana 59801,
appearing on behalf of the Plaintiff.

MICHAEL DONAHOE, Esq., of Federal Defenders of Montana,
50 West 14th Street, Suite 300, P.O. Box 250, Helena,
Montana 59624,
appearing on behalf of the Defendant.

Reported by Julie M. Lake, RDR, CRR, CSR
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I N D E XWITNESS:

PAGE:

GOVERNMENT WITNESSES:MATTHEW J. SALACINSKI

Direct Examination by Ms. Peterson..... 7
Cross-Examination by Mr. Donahoe..... 13

MONTE SHAIDE

Direct Examination by Ms. Peterson..... 21
Cross-Examination by Mr. Donahoe..... 27

DEFENSE WITNESSES:WILLIAM R. NIELSEN

Direct Examination by Mr. Donahoe..... 32
Cross-Examination by Ms. Peterson..... 35

MARTIN WHITE

Direct Examination by Mr. Donahoe..... 39
Cross-Examination by Ms. Peterson..... 42
Redirect Examination by Mr. Donahoe..... 43

BETSY ANDERSON

Direct Examination by Mr. Donahoe..... 45
Cross-Examination by Ms. Peterson..... 49

EXHIBITS: None

Certificate of Court Reporter..... 107

TUESDAY, JULY 19, 2011

BE IT REMEMBERED that on Tuesday, July 19, 2011, at 10:32 a.m., in the Russell Smith Courthouse, Missoula, Montana, before the Honorable Donald W. Molloy, United States District Judge, the following proceedings were had:

(Whereupon, the following proceedings were held in open court with counsel present and the Defendant present.)

THE COURT: Call the next matter on the calendar,
please.

THE CLERK: This is the time set for sentencing in
CR 11-8-M-DWM, United States of America vs. William Richard
Nielsen.

THE COURT: Ms. Peterson, have you read the
Presentence Investigation Report?

MS. PETERSON: Yes, Your Honor.

THE COURT: Do you have any objections to it?

MS. PETERSON: No, Your Honor.

THE COURT: Are you going to move for the one-level reduction for the acceptance of responsibility under 3E1.1B?

MS. PETERSON: Yes, Your Honor.

THE COURT: You indicated that you had witnesses you intended to call this morning; is that correct?

MS. PETERSON: That's correct, Your Honor.

THE COURT: Are you still intending to call them?

MS. PETERSON: I do, Your Honor.

1 THE COURT: And is there--is the child victim here?

2 MS. PETERSON: She's not, Your Honor. Her parents
3 are both present.

4 THE COURT: And do they intend to speak?

5 MS. PETERSON: Yes, Your Honor.

6 THE COURT: What are their names?

7 MS. PETERSON: Jeff and Bobbi Jo.

8 THE COURT: All right, thank you.

9 Mr. Donahoe, good morning.

10 MR. DONAHOE: Good morning, Your Honor.

11 THE COURT: Have you read the Presentence
12 Investigation Report?

13 MR. DONAHOE: I have.

14 THE COURT: Has William Richard Nielsen read the
15 Presentence Investigation Report in its entirety?

16 MR. DONAHOE: He has.

17 THE COURT: Have you discussed it thoroughly with
18 him?

19 MR. DONAHOE: Yes.

20 THE COURT: I know you have some objections, but I
21 think, unless you have some other idea or Ms. Peterson does,
22 perhaps the best way to proceed right now would be to let her
23 call her witnesses and then we can have whatever arguments
24 might stem from that proof.

25 There are some of your objections, though, that I

1 assume they have been worked out with the Probation Office. Is
2 that right?

3 MR. DONAHOE: Well, the process was a little
4 truncated because of the holiday. You know, I tried to pare
5 that down when I got to the memo phase. But I can address
6 those things when I talk to Your Honor about that.

7 THE COURT: Why don't we have Ms. Peterson call her
8 first witness.

9 MS. PETERSON: Yes, Your Honor. The Government
10 calls Agent Matt Salacinski.

11 THE COURT: Would you step up in front of the clerk,
12 please. Raise your right hand and be sworn.

13 (MATTHEW J. SALACINSKI sworn in.)

14 THE COURT: Have a seat over here, if you would,
15 please.

16 For the record, would you state your full name and,
17 for the benefit of the court reporter, spell your last name.

18 THE WITNESS: Matthew J. Salacinski.
19 S-A-L-A-C-I-N-S-K-I.

20 THE COURT: And, Mr. Salacinski, what is your
21 profession?

22 THE WITNESS: I'm currently employed as a Special
23 Agent with the Federal Bureau of Investigation. My current
24 assignment is digital forensic examiner.

25 THE COURT: And what city do you live in?

1 THE WITNESS: Billings, Montana.

2 THE COURT: Ms. Peterson.

3 MS. PETERSON: Thank you, Your Honor.

4 DIRECT EXAMINATION

5 BY MS. PETERSON:

6 Q. Agent Salacinski, how many years of involvement do you
7 have with computer forensic examination?

8 A. I've been running the digital forensics lab in Billings,
9 Montana since early 2005.

10 MS. PETERSON: Your Honor, may I ask if the
11 Defendant will stipulate to Agent Salacinski's expertise in
12 this area?

13 THE COURT: I guess you can ask.

14 MR. DONAHOE: I will.

15 THE COURT: I'm sorry?

16 MR. DONAHOE: I will. I agree.

17 THE COURT: All right. Then, the agent will be
18 accepted as an expert in the area of digital forensics.

19 MS. PETERSON: Thank you, Your Honor.

20 Q. (By Ms. Peterson) Agent Salacinski, are you familiar
21 with the definition of a computer that's set forth in 18 U.S.C.
22 1030(e)(1)?

23 A. I am, as I reviewed it recently.

24 Q. And are you--do you also have some training and
25 background and have some experience with regard to cellular

1 phones?

2 A. I do.

3 Q. I would like to break down the definition a little bit
4 and I'm going to ask you questions as I break it down.

5 So starting at the first part of that definition
6 that states that computers mean an electronic, magnetic,
7 optical, electrochemical or other high-speed data processing
8 device performing logical or arithmetic functions.

9 Would a cellular phone fit into that definition?

10 A. It does.

11 Q. And can you please explain to the Court why.

12 A. Cellular phones, at their core, perform a lot of
13 arithmetic and logical functions just in their basic operation.
14 For instance, in storing files, pictures, contacts, receive
15 calls. When this data is placed on the device, the device has
16 to have the means of determining whether there is enough
17 storage available, so arithmetic operations are performed to
18 determine the amount of data that needs to be stored and
19 whether there is enough area in unallocated storage.

20 THE COURT: Let's focus in on the phone that he had,
21 so we're not talking in generalities.

22 MS. PETERSON: Your Honor, the problem that will
23 come out with Agent Shaide's testimony is that the Defendant
24 lost the particular phone that was used in this case, so we do
25 not have the specific phone.

1 What will be presented through Agent Shaide is that
2 the Defendant admitted to making calls, he admitted to sexting,
3 and the phone was also used to take photographs. So that's why
4 I'm unable to direct Agent Salacinski to a specific make and
5 model of the cellular phone.

6 THE COURT: All right.

7 Q. (By Ms. Peterson) I'm sorry, were you finished?

8 A. So, you know, in summary fashion, the device, because it
9 stores information, needs to perform logical and math
10 operations in order to determine whether there is enough
11 storage available.

12 Also, nearly all cell phones these days have the
13 ability to lock somebody out, so there is a password function.
14 Password functions require math operations in order to perform
15 their underlying logical operations: Whether or not you enter
16 the correct password, for instance, so that the device will let
17 you in to use it.

18 Q. Continuing on then with that definition. Other
19 high-speed data processing device that performs storage
20 functions and includes any data storage facility.

21 Again, would a cellular phone meet that function?

22 A. It does, much in the same sense that what people would
23 normally associate with their common desktop computer. Cell
24 phones have several levels of data storage.

25 When you first turn the device on, in order for the

1 device to operate, the keyboard, the screen--or the display, I
2 should say, sound, tiny little programs need to be stored on
3 the device so that these things can operate once the device is
4 turned on. So those--those things are stored on the phone much
5 in the same manner that when you turn on a computer, the
6 keyboard, sound card, the display functions without you having
7 to do anything other than having to stand there while the
8 computer boots up.

9 Secondly, phones store information, as do computers
10 or other digital devices, in that you can stick micro SD cards
11 in them. They have USB, universal serial bus, interfaces for
12 data storage. And, in fact, you can remove SD cards from cell
13 phones, place them in computers, and vice versa. So they have
14 the ability to address removable storage.

15 They also have--most these days have built-in or
16 pre-manufactured onboard storage so you can store text
17 messages, pictures, movies, music on the device itself. So it
18 functions in the same manner.

19 Q. Would any cell phone that had the ability to text have
20 the storage capability?

21 A. Yes. I mean, without regard to what--on what level the
22 phone stores the text message, the storage capability is there,
23 whether it's a removable or it's straight onto the main circuit
24 board of the device.

25 Q. Then finishing out that definition, the last portion

1 says, "Or communications facility directly related to or
2 operating in conjunction with such device."

3 Does the cellular phone meet the latter part of that
4 definition?

5 A. It does.

6 Q. Again, can you explain why?

7 A. Cell phones, just like computers, are, especially these
8 days, devices that are designed to be members of networks.

9 When a cell phone accesses the cellular telephone
10 network, it's doing so for the purpose of communicating with
11 some predefined set of protocols to make a telephone call to
12 another cell phone that is on the network. Okay, and that does
13 not--to another--I should say to another telephone that is on
14 the publicly switched telephone network.

15 So if you are going to call a landline, a desktop
16 computer or another cell phone, you are accessing, with your
17 cell phone, a network that is then designed to communicate with
18 other clients on the network. Computers do the same thing when
19 they text to other computers or when they send text messages to
20 cell phones or when they simply access a website on the
21 Internet.

22 Q. With regards to the specific cell phone forensic
23 examination in this case, was anything found on the victim's
24 phone that indicated any kind of web involvement from the
25 victim and the Defendant's phone that was used?

1 A. When the cell phone was examined by Detective Woog in my
2 laboratory, a number of photographs were taken of the screens
3 on the phone. And one of those--I should say a series of
4 photographs that were captured were of authentication or what
5 we would commonly refer to as log-in screens and through--for
6 web access. So those pictures were taken and the--the phone
7 had clearly been used to access some web content wherein a user
8 name and an ID--I'm sorry, the user name and a password was
9 required.

10 Q. And that was from the victim's cell phone that she was
11 actually accessing the web using a user ID, correct?

12 A. That's correct.

13 Q. And was there any indication of what was on the other
14 side, what text she was connecting to or whether or not that
15 individual accessed the web?

16 A. There was a--okay, that's two questions.

17 Number one, there was a capture of an incoming item
18 that was posted from a William, and it was a short message
19 there. So after that log-in process took place, that message
20 was received and stored locally on the phone, on the device.
21 Okay?

22 As far as how that message--the sender of that
23 message, there are a number of ways that can get there. I
24 can't speak to that in particular.

25 MS. PETERSON: No other questions, Your Honor.

1 THE COURT: Cross-examination?

2 MR. DONAHOE: Thank you.

3 CROSS-EXAMINATION

4 BY MR. DONAHOE:

5 Q. I guess we'll go backwards. Did the message come from
6 his phone?

7 A. I can't tell you if it came from his phone. It was
8 identified as from William. That's as much as I can say.

9 Q. So did it come from his phone? Do you know that
10 categorically?

11 A. No.

12 Q. No, you do not. And you didn't examine his phone, did
13 you?

14 A. No.

15 Q. How many types of cell phones are there on this planet,
16 as we speak?

17 A. Hundreds, if not maybe more than a thousand.

18 Q. With a variety of sponsors or manufacturers; wouldn't
19 that be true?

20 A. That's absolutely true.

21 Q. And they all have different capabilities, don't they?

22 A. They do.

23 Q. Is a person--is your testimony that a person is using a
24 cell phone as a computer when he's talking on it?

25 A. He's using the device in the same manner that one can

1 use a computer.

2 Q. That's not the question. Is he using it as a computer?

3 A. I think he is.

4 Q. All right. And what's the basis for that conclusion?

5 A. Okay, because he's talking on a network enabled device
6 on a network, communicating with another device on the network.

7 Q. So it was an interactive computer? It's an interactive
8 computer device when one makes a call?

9 A. Yes, it is.

10 Q. And in the specifics here, what evidence do you have to
11 show that the computer was accessed, and what computer are we
12 talking about?

13 A. I'm sorry, I don't understand the question.

14 Q. All right. Apparently you have cell phone sender, cell
15 phone receiver.

16 A. Yes.

17 Q. And these cell phones, sender goes through a computer
18 service and comes out and goes to receiver. Is that the gist
19 of it?

20 A. It accesses a network. And the problem I have with your
21 question is the computer service. It's a device that accesses
22 a network using a predefined protocol as any computer--as any
23 computer device were if it were network capable.

24 Q. But the service is the computer. The network is the
25 computer, is it not?

1 A. No, sir. The network is a conglomeration of routers and
2 switches and cell phone towers and landlines that connect all
3 these devices together, physically routing using certain
4 protocols--we'll just call it firmware/software--that allow
5 them to talk to one another over the physical network.

6 Q. So is it your testimony that those towers and switches
7 and so on, that has nothing to do with computers?

8 A. No, they are computers. They are the network themselves
9 that the device is--computing devices can access one another
10 using the network. They are members of the network.

11 Does that answer your question?

12 Q. Not really.

13 So was this computer--this cell phone, assuming for
14 sake of discussion that these calls were made, acting as a
15 computer? Was it storing data while they were talking?

16 A. Yes, it was. It was recording--I mean, okay, I did not
17 examine his phone. We're talking about these devices
18 generically here.

19 Q. Yes.

20 A. They keep track of the length of the call, to whom the
21 call was made, that sort of thing. So they store metadata
22 about the communications and then--so, yeah, data is being
23 stored, in addition to using the device as a communication
24 device as well.

25 Q. But there is no way that what is being stored is going

1 to tell you what the content of that conversation is.

2 A. Not if it was a voice communication.

3 Q. Correct.

4 A. Unless the user had set the phone up to be used in that
5 case, but I don't think that that's the underlying premise of
6 your question.

7 Q. But we don't have that here, do we?

8 A. I don't think we do, but I don't know what his--I've
9 never seen his phone.

10 Q. So beyond the metadata, there was nothing of a voice
11 nature that was captured by this cell phone when these calls
12 were being made. Correct?

13 A. Which cell phone?

14 Q. Either cell phone.

15 A. His, I don't know. Hers, no.

16 Q. Now, let's--same set of questions but for texting.

17 A. Okay.

18 Q. Is the answer different?

19 A. No. Well, okay. Which set--could you start out--just
20 get me started on a question. I don't know which question I'm
21 answering.

22 Q. Well, I think we've established, have we not, that no
23 voice data was captured, probably, between these two parties,
24 assuming that they spoke.

25 A. Correct.

1 Q. All right. With the exception of the metadata.

2 A. Correct.

3 Q. Time of call, length of call, that sort of thing.

4 A. That's correct.

5 Q. Now, with texting, would the answer change in terms of
6 content?

7 A. Yes, it would.

8 Q. It would, wouldn't it? Why?

9 A. Generically speaking, phones capture both incoming and
10 outgoing text messages and the party to whom the message was
11 sent, the device the message was sent to, to include date and
12 time of transmission.

13 Q. So just as an illustration, I live in Helena and on my
14 way over here today I had two texts from my wife and I cleared
15 up some family business for the day. Now, if I open my phone
16 and looked at it, that correspondence would be in there,
17 wouldn't it?

18 A. If your phone is set up for that, yes, sir.

19 Q. Sure. And you could look at it if you wanted to, if I
20 wanted to show it to you. Correct?

21 A. Correct.

22 Q. And I could save those things. I could probably
23 download them and put them on a computer, couldn't I?

24 A. If you have the software to interface with the phone,
25 you can.

1 Q. Okay. Now, given the difference between the noncapture
2 of the voice and the capture of the text, and for relevance of
3 the issue that's before the Court here, can you tell me whether
4 the inducement, the enticement, the coercion was conducted in
5 this case through voice or through text?

6 A. I did not--I didn't conduct the investigation. I read
7 the case file, but I don't know the nature of the
8 communications between the victim and the suspect in this case,
9 other than I know cell phones were involved and that one of
10 those phones--at least one of those phones ended up in my
11 laboratory.

12 Q. I have nothing further. Thanks.

13 THE COURT: Any redirect?

14 MS. PETERSON: No, Your Honor.

15 THE COURT: What's the difference between the way a
16 cell phone works and the way Skype works?

17 A. Skype, they are both acting as communication devices.
18 Skype, when you access the Internet if you are doing it, say,
19 from your computer, Your Honor, you are accessing, say, a
20 wireless network or a cable network, in essence the physical
21 mode of access to the network is out over either Ethernet or
22 what we call an 80211 signal, commonly known as a wireless
23 signal. On top of that physical signal your voice and your
24 picture are riding out.

25 On the cell phone--let's say I have an iPhone, and

1 the iPhone camera is looking at me and I'm essentially doing
2 what Skype does. The physical signal that my picture and my
3 video are riding out onto the network on, it's over a different
4 flavor or type of radio signal, but it's a radio signal
5 nonetheless.

6 So what it really comes down to is communication
7 protocol, the way they are designed. One is with a different
8 set of rules over a wire. Another is a different set of rules
9 over a radio signal.

10 THE COURT: But do the devices themselves process
11 information and go through protocols relatively in a similar
12 fashion?

13 A. They do, in that the video and the voice are carried by
14 packets that are processed and transmitted over the network
15 from device to device. They are identical in that fashion.

16 THE COURT: So if you use the generic term
17 "computer," it describes both of them?

18 A. I think it does. You know, many times, especially these
19 days, we get tied up--or we get hung up on a form factor. One
20 sits on my desk or sits on my lap, the other is a hand-held
21 device.

22 But to be honest with you, because they both have an
23 operating system and storage and they both function
24 arithmetically and logically in much the same manner, the form
25 is really not the issue as much as it is the function, the

1 operating system and the way the device is designed to operate
2 on a network.

3 THE COURT: All right. Any follow-up?

4 MS. PETERSON: No, Your Honor.

5 MR. DONAHOE: Nothing.

6 THE COURT: All right. Thank you. You may step
7 down.

8 Do you have any other witnesses?

9 MS. PETERSON: Yes, Your Honor. The Government
10 calls Agent Monte Shaide.

11 THE COURT: Would you step up, raise your right hand
12 and be sworn, please.

13 (MONTE SHAIDE sworn in.)

14 THE COURT: Have a seat right over here. For the
15 record, would you state your name and spell your last name.

16 THE WITNESS: Monte Shaide. S-H-A-I-D-E.

17 THE COURT: And, Mr. Shaide, what is your
18 profession?

19 THE WITNESS: I'm a special agent with the Federal
20 Bureau of Investigation.

21 THE COURT: Where is your duty station?

22 THE WITNESS: My current duty station is the
23 Missoula Resident Agency in Missoula, Montana.

24 THE COURT: Ms. Peterson.

25 MS. PETERSON: Thank you, Your Honor.

DIRECT EXAMINATION

BY MS. PETERSON:

Q. Agent Shaide, were you involved with the investigation against the Defendant, William Nielsen?

A. Yes, I was.

Q. Are you familiar with all of the reports and the background information?

A. Yes, I am.

Q. Did the--strike that.

During the investigation was the Defendant interviewed?

A. Yes, he was.

Q. And was the victim interviewed?

A. Yes, she was.

Q. Did you determine that there was communication between the two of them via cell phones?

A. Yes.

Q. And did they both admit that they called each other utilizing their cell phones?

A. Yes.

Q. Did they both admit that they texted each other using their cell phones?

A. Yes.

Q. And, in fact, they actually both admitted that they engaged in phone sex as well, correct?

1 A. Correct.

2 Q. And that was while she was in Wyoming and he was in
3 Missoula, Montana?

4 A. Yes.

5 Q. Did the phone that the Defendant used to call the victim
6 in this case, was that phone ever recovered by the FBI?

7 A. No, it was not.

8 Q. And why was that?

9 A. During the interview William stated that he had lost his
10 phone two days prior to the 9th of January when he was
11 apprehended. And it was along a walk he said he took outside
12 his apartment, which was two days prior. So roughly around the
13 7th of January he stated he lost his phone.

14 Q. During his interview did you also talk about specifics
15 with regard to that phone that he used, the lost phone?

16 A. Yes.

17 Q. And did he talk at all about anyone taking photographs
18 with that phone?

19 A. Yes.

20 Q. And what was that?

21 A. He admitted he took some photographs of the victim with
22 his phone, so that the phone was camera capable. And also the
23 victim admitted that she had pictures taken of her by the
24 Defendant with the same phone.

25 Q. Going specifically to the Defendant's interview and the

1 victim's interview.

2 Did you talk to them about their telephone
3 discussions before she traveled to the State of Montana?

4 A. Yes.

5 Q. And was it disclosed that the victim let the Defendant
6 know that she had somehow used drugs previously?

7 A. Yes.

8 Q. Was there any discussion about the use of drugs in
9 coming to Montana?

10 A. Yes.

11 Q. And what was that?

12 A. It was the fact that the victim talked about her
13 likeness of marijuana, OxyContin, Percocet and other drugs.
14 She also had talked about drinking and partying.

15 She was a girl that was a little bit troubled and
16 had a family dispute going on with her mom and dad being
17 divorced. Her dad works a lot. She was at her dad's house for
18 a while and she was somewhat bored and looking for someone to
19 reach out to.

20 Q. And this was all information that was relayed to the
21 Defendant?

22 A. Yes.

23 Q. Did they discuss the fact that she wasn't a virgin?

24 A. I'm unaware of discussing the fact that she wasn't a
25 virgin, but she admitted that she wasn't a virgin in the

1 interview.

2 Q. Was there any discussion that involved sex between the
3 two of them?

4 A. Yes. They both admitted that they had phone sex and
5 were sexting each other prior to their meeting.

6 Q. Was there a discussion about how she would get to
7 Montana?

8 A. Yes.

9 Q. And what was that?

10 A. She would have to get there by bus.

11 Q. How about her age at the time? What did you determine
12 in your interview with the Defendant based on the victim's age?

13 A. Initially when they were in the chat room, which was
14 determined by the Defendant's interview possibly to be
15 Livelinks, that they were in there and she said initially she
16 was 18.

17 A few days prior to even getting on the bus, she had
18 told the Defendant she was actually 12, and the Defendant told
19 her he was a registered sex offender and it will be our little
20 secret.

21 Q. At the time that the Defendant was initially arrested,
22 did he minimize his involvement in this crime?

23 A. Yes.

24 Q. Explain how that transpired up to the point where he
25 finally admitted his conduct.

1 A. Initially he stated that he didn't know she was 12. She
2 showed up and then he realized, after meeting her, she probably
3 wasn't as old as she looked but didn't really know her age. To
4 the point where after the interview continued and he was
5 polygraphed, when I went in to interview him he admitted that,
6 *I was--I in fact knew she was 12 a few days prior before*
7 *coming.* Initially he wouldn't admit that.

8 Q. Did you get into some of the specifics of the
9 victimization that occurred after she arrived?

10 A. Yes.

11 Q. Can you describe that for the Court.

12 A. The Defendant had her refer to him as daddy. He
13 referred to her as his fuck pet. They would go back and forth
14 engaging in sexual activity. Oral and vaginal sexual activity.
15 Bondage. The Defendant is in to bondage and that was kind of
16 his whole theme of things, is wanting to tie up, wanting to
17 choke out, do things of that nature.

18 Q. Did he specifically talk to you about his reasons of why
19 he did not tie her up?

20 A. Yes. He stated that he didn't have enough rope. And
21 when I asked him, *What do you mean by enough rope,* he goes,
22 *Well, every good bondage person knows that three feet of rope*
23 *will not tie a person up. You need at least six feet.*

24 I asked him in more detail how he knew that and he
25 said, *Well, books and other research I've done.*

1 Q. Did you talk to him about what his intention was with
2 regards to the victim, long-term intention?

3 A. When I asked him, I said, *She knew you were a registered*
4 *sex offender. You knew she was 12. She's in your apartment.*
5 *She doesn't have ability to get out because you are bullying*
6 *her, keeping her there, telling her she's not going to leave.*
7 *She has no way to leave and is scared.*

8 I asked him, *Well, what was your intention? What*
9 *were you planning on doing with this girl? And he said, I*
10 *guess I'll have to fuck her until she's 18.*

11 Q. And did you--excuse me, strike that.

12 Did you talk to him specifically about whether or
13 not he knew that it was wrong to use a phone to engage in
14 sexual conversations with a minor or to entice her to Montana?

15 A. Yes. He realized he was in trouble for soliciting
16 possible sexual intercourse with a minor and then possible
17 kidnapping, is how he put it in his words during the interview.

18 Q. And the victim's physical state at the time that she was
19 found and then seen for medical, was it consistent with his
20 admissions on what he did to her?

21 A. Yes.

22 Q. And did he admit that he had slapped her and bit her?

23 A. Yes. He said he bit her lightly, choked her, slapped
24 her, and she had injuries that were conclusive to his actions.

25 MS. PETERSON: I have no other questions, Your

1 Honor.

2 THE COURT: Cross-examination?

3 CROSS-EXAMINATION

4 BY MR. DONAHOE:

5 Q. Sir, insofar as the communications are concerned, you
6 were satisfied, I guess, when you took the confession or the
7 statement from Mr. Nielsen that he had made this correspondence
8 over the phone. Would that be fair enough to say?

9 A. Yes.

10 Q. With A.J. And it came in two forms: One was in
11 conversation apparently and some was in text. True?

12 A. Yes, my understanding.

13 Q. Okay. Did you ever differentiate between the two in
14 terms of content?

15 A. I never differentiated between the two, other than his
16 statement and her statement involving the conversations. The
17 text was--a search warrant was applied for the text and my
18 knowledge was we didn't have the text that would show between
19 the correspondence.

20 Q. Okay. So basically any inducement, enticement, would it
21 be a fair thing to say today, occurred in the conversation?

22 A. Yes. It could have occurred in conversation in the chat
23 room as well.

24 Q. All right, but let's put that aside. Maybe we can talk
25 about that.

1 But the inducement, at least for purposes of this
2 offense--you are an FBI agent, right?

3 A. Yes.

4 Q. You recognize this is a federal offense, right?

5 A. Yes.

6 Q. And the whole jurisdictional hook here is the use of the
7 cell phone essentially, right?

8 A. Yes.

9 Q. Okay. So the conversation was the inducement, or the
10 coercion, or the persuasion.

11 A. Yes.

12 Q. Would that be fair enough to say today?

13 A. Yes.

14 Q. So we're not really relying on any textual material that
15 may have transpired between the two.

16 A. No, If--

17 Q. Okay. You mentioned in your direct a little bit about
18 drugs. Did you canvass or search the apartment for drugs?

19 A. The search warrant was conducted locally by Missoula
20 Police Department. And my understanding is, not from reading
21 the reports, I believe there was a little contraband found in
22 the apartment.

23 Q. I thought you were conversant with all of the reports in
24 the case?

25 A. Yes, I am. I would have to read that report in front of

1 me as far as exactly what was located as far as any type of
2 drug material.

3 Q. So you don't know today?

4 A. I don't know today.

5 Q. Something you can check?

6 A. Something I probably could check.

7 Q. Was there cocaine?

8 A. No, there was no cocaine.

9 Q. Was there marijuana?

10 A. I believe there was some residue of marijuana.

11 Q. Any alcohol?

12 A. I believe we had some alcohol, a little bit.

13 Q. Anything beyond that?

14 A. Not to my knowledge.

15 Q. Percocet? Any kind of prescription drugs? Anything
16 like that?

17 A. I'm not certain of the prescription drugs that were
18 prescribed to William.

19 Q. I take it you've been doing this work for a little
20 while.

21 A. Yes.

22 Q. Is it unusual for a suspect to minimize his involvement,
23 especially in the initial phases of an interrogation or taking
24 a statement from somebody?

25 A. Yes.

1 Q. It is?

2 A. Yes. You see a lot of people usually tend to minimize.
3 Subjects do initially.

4 Q. They do initially. So--and that's part of the process,
5 is staying with the suspect. And you have training for that,
6 don't you?

7 A. Absolutely.

8 Q. Yeah. And the whole point, which you were successful
9 here, is to bring the individual through the interview process,
10 to have some decent understanding and consistency between a
11 statement taken from your suspect and maybe other people
12 involved. Right?

13 A. Correct.

14 Q. And did you achieve that here as a result of your
15 process?

16 A. Yes.

17 Q. And you were satisfied, in fact, that just prior to
18 A.J.'s departure for Montana, there was discussion that she was
19 12.

20 A. Yes.

21 Q. And, likewise, Mr. Nielsen's discussion or notice to
22 A.J. that he was a sex offender. Right?

23 A. Yes.

24 Q. And that happened just prior to her departure, true?

25 A. From both statements that I reviewed and one of the

1 statements I conducted with the Defendant, is approximately two
2 days before she departed she was aware he was a sex offender,
3 he was aware she was 12.

4 Q. This might be an unfair question. But do you know,
5 because I do, how long it took from initial Livelinks contact
6 to the police being in the apartment?

7 A. No, I do not.

8 Q. You do not, okay.

9 And one last thing. Do you know how the trip was
10 financed?

11 A. Yes. The victim stated that she took money from her
12 mother's purse and purchased the bus ticket to the Missoula.

13 Q. Now, was there any discussion in the statement taken
14 from Mr. Nielsen about him supplying money?

15 A. Not to my knowledge.

16 Q. Okay. I have nothing further. Thanks.

17 THE COURT: Any redirect?

18 MS. PETERSON: No, Your Honor, thank you.

19 THE COURT: Thank you. You can step down.

20 Any other witnesses?

21 MS. PETERSON: No, Your Honor.

22 THE COURT: Do you have any witnesses?

23 MR. DONAHOE: I do. I have three.

24 THE COURT: What are your witnesses going to testify
25 about?

1 MR. DONAHOE: Well, I have--

2 THE COURT: Do they have anything to do with the
3 issues that are--

4 MR. DONAHOE: The computer?

5 THE COURT: Yes.

6 MR. DONAHOE: Well, I have that and--

7 THE COURT: All right, call your first witness.

8 MR. DONAHOE: I would call Mr. Nielsen.

9 THE COURT: All right. Would you raise your right
10 hand and be sworn.

11 (WILLIAM R. NIELSEN sworn in.)

12 THE COURT: Have a seat right over here, please.
13 State your full name, please.

14 THE WITNESS: William Richard Nielsen.

15 THE COURT: Mr. Donahoe.

16 DIRECT EXAMINATION

17 BY MR. DONAHOE:

18 Q. Sir, you reviewed the Presentence Report in depth,
19 didn't you?

20 A. Yes.

21 Q. And we talked about it, didn't we?

22 A. Yes.

23 Q. Now, later in the process I gave you notice that there
24 was an impact statement that was submitted by A.J., didn't I?

25 A. Yes.

1 Q. And I read it to you verbatim, did I not?

2 A. Yes.

3 Q. So you are familiar with the content of that statement,
4 correct?

5 A. Correct.

6 Q. And I'm not going to read it or discuss it in open
7 court, but do you dispute that statement?

8 A. Parts of it.

9 Q. With respect to drug usage, can you tell me what drugs
10 were in your house or apartment?

11 A. Two grams of medical marijuana, which I did have my card
12 for.

13 Q. Was there any alcohol?

14 A. Two small bottles that I was using to clean out the
15 holes where I had just had teeth pulled.

16 Q. When you say small bottles?

17 A. (Indicating.)

18 Q. They were kind of like airplane size?

19 A. Yeah.

20 Q. What did they contain?

21 A. One had Jack Daniels. The other had rum.

22 Q. Any other kind of drug substance? Cocaine,
23 methamphetamine, Percocet? Anything of that nature?

24 A. No.

25 Q. No drugs?

1 A. (Witness shakes head.)

2 THE COURT: You have to answer out loud.

3 A. No, sir.

4 Q. (By Mr. Donahoe) Did you use the marijuana while A.J.
5 was at your apartment?

6 A. Yes.

7 Q. Did she use the marijuana?

8 A. I didn't give it to her.

9 Q. But did she use it?

10 A. Yes.

11 Q. Beyond that, are you aware of any other drugs that were
12 taken by A.J. while she was at your apartment?

13 A. One Ibuprofen for a headache she said she had.

14 Q. Beyond that, anything?

15 A. No.

16 Q. Did you, during the time that A.J. was at your
17 apartment, leave the apartment?

18 A. Several hours each day.

19 Q. For what purpose?

20 A. School, helping out friends, grocery shopping, helping
21 out my family.

22 Q. Did A.J. accompany you on those excursions?

23 A. No.

24 Q. Where did she stay?

25 A. She stayed in the apartment, even though I did offer to

1 bring her along.

2 Q. So she declined and would remain behind?

3 A. Yes.

4 Q. Did you lock her in the apartment?

5 A. No.

6 Q. How long would you be gone on these little excursions?

7 A. Anywhere between five and eight hours.

8 Q. Did you ever communicate with A.J. during those times
9 while you were absent?

10 A. Until I lost my phone, she would send me a text, asking
11 when I would be back or if there was anything I could pick up
12 for her specifically food wise.

13 Q. Did you keep her confined to the apartment?

14 A. No.

15 Q. I have nothing further. Thanks.

16 THE COURT: Cross-examination?

17 CROSS-EXAMINATION

18 BY MS. PETERSON:

19 Q. With regards to never locking the apartment, did the
20 victim ever leave the apartment?

21 A. I asked if she wanted to go on walks or anything, or if
22 she wanted to go out on her own for a bit while I was out. She
23 said no.

24 Q. Did the victim ever leave your apartment?

25 A. No.

1 Q. And she was there for going on five days?

2 A. The 5th through the 9th.

3 Q. What clothes did she wear while she was in your
4 apartment?

5 A. She had a jacket, T-shirt, bra, pants. I washed her
6 clothes twice when I was doing my laundry, so she would borrow
7 one of my spare T-shirts and my swim trunks.

8 Q. What did she generally have on when she was in your
9 apartment?

10 MR. DONAHOE: Objection. Exceeds the scope of
11 direct.

12 THE COURT: Overruled.

13 A. One of my T-shirts and nothing else.

14 Q. (By Ms. Peterson) And isn't it true that when you were
15 interviewed by Monte Shaide, that you told him that a lot of
16 times she was naked, she didn't have any clothes on?

17 A. When I was there, yeah. I don't know about the times
18 when I was gone.

19 Q. And you discussed partying and drugs with her over the
20 cell phone prior to her coming to Montana?

21 A. When we were talking on Livelinks and before the
22 texting, yeah.

23 Q. What did the texting entail? What would you text back
24 and forth?

25 MR. DONAHOE: Same objection.

1 THE COURT: Overruled.

2 A. The texting started out just how days were going,
3 general stuff like that. One night I got a text from her
4 saying, *Have you ever had text sex or phone sex?* I was like,
5 *it's not--I sent back, It's not something I'm in to, but we*
6 *could give it a whirl.*

7 Q. Did you give it a whirl?

8 A. Yeah.

9 Q. Would you talk to her daily on your cell phone?

10 A. I'd answer whenever she called, yeah.

11 Q. And you told Agent Shaide in the interview that you knew
12 she was 12 approximately two to three days before she traveled
13 from Wyoming?

14 A. Approximately.

15 Q. While you were out running errands when the two of you
16 were both in Missoula, did she ever text you asking you to get
17 drugs?

18 A. Several times, but I never had the money for them.

19 Q. So money was the issue?

20 A. Yes.

21 Q. But you have a medical marijuana card, correct?

22 A. Yeah.

23 Q. And so the marijuana that you had in the house you
24 obtained for your medical purpose?

25 A. Yes.

1 Q. And you are saying that she used it without your
2 permission?

3 A. Yes.

4 Q. Did you--strike that. When you were--when you were
5 engaged in your sexual contact with the victim, was it violent?

6 A. I told her that I would stop whenever she said stop.

7 Q. You told the 12-year-old victim that as long as she
8 controlled it, that you would keep being violent? Yes?

9 A. Yes.

10 Q. And Agent Shaide testified that you slapped her and bit
11 her and at one point actually choked her when you were on top
12 of her. Is that accurate?

13 A. Yes.

14 Q. Is his statement as to why she was not tied up accurate?

15 A. Yes.

16 Q. And you actually said that it was primarily because you
17 didn't have the money to go out and buy the six feet of rope,
18 that was the issue.

19 A. Not on the rope.

20 MS. PETERSON: I don't have any other questions,
21 Your Honor.

22 THE COURT: Any follow-up?

23 MR. DONAHOE: No, thank you.

24 THE COURT: You can step down.

25 Would you call your next witness.

1 MR. DONAHOE: Martin White.

2 THE COURT: Come up in front of the room, raise your
3 right hand and be sworn, please.

4 (MARTIN WHITE sworn in.)

5 THE COURT: Have a seat right over here, please.
6 Would you state your full name for the record.

7 THE WITNESS: Martin Lee White.

8 THE COURT: Mr. White, what city do you live in?

9 THE WITNESS: Missoula, Montana.

10 THE COURT: What's your profession or occupation?

11 THE WITNESS: Currently unemployed, looking for
12 work.

13 THE COURT: Mr. Donahoe.

14 DIRECT EXAMINATION

15 BY MR. DONAHOE:

16 Q. Mr. White, do you know Mr. Nielsen?

17 A. Yes, I do.

18 Q. How do you know him, sir?

19 A. I used to live with his mother.

20 Q. Directing your attention to January 5th through
21 January 9th, did you have contact with Mr. Nielsen?

22 A. Every day.

23 Q. And how did you have that contact?

24 A. Usually by way of either phone calls or he would come
25 over to his mother's house and use the Internet.

1 Q. Now, you were renting space from his mom?

2 A. Yes, I was.

3 Q. And did you have a computer set up?

4 A. Yes, I did.

5 Q. Did you have a common education interest with

6 Mr. Nielsen?

7 A. Yes, I did. We were attending the same online
8 university.

9 Q. So Mr. Nielsen would visit his mom's place and do the
10 school work with you?

11 A. Yes.

12 Q. And that was a common and frequent occurrence?

13 A. Yes, every day.

14 Q. Now, during this period between 5 and 9 January, did you
15 have occasion to visit Mr. Nielsen's apartment while A.J. was
16 there?

17 A. One day.

18 Q. And was there a specific purpose that you went to the
19 apartment for?

20 A. Mr. Nielsen had called me to ask if I could come over
21 and help move a bed frame.

22 Q. And were you happy to do so?

23 A. Yes, I was.

24 Q. Did you have contact with A.J.?

25 A. She introduced herself; that was about the extent of the

1 contact with her.

2 Q. Can you talk to me about the configuration of the
3 apartment. I mean, is it a big apartment? Is it a small
4 apartment?

5 A. It was a fairly small one-bedroom apartment. When you
6 walk in the door, you were right there in the kitchen. The
7 living room was right there off of the kitchen. Then there was
8 a slight dividing wall between the living room and the bedroom,
9 and the bathroom was off of the bedroom.

10 Q. Had you been there on other occasions?

11 A. Yes, I had.

12 Q. So this was comfortable for you?

13 A. Yes.

14 Q. He's your friend and you are in and out.

15 A. Yes.

16 Q. Where was A.J. when you went in?

17 A. She was in the living room sitting in the chair watching
18 TV.

19 Q. And was she clothed?

20 A. Yes, she was.

21 Q. Did she arise and come and introduce yourself to her, or
22 did you go to her or did you meet halfway or what?

23 A. She introduced herself while sitting in the chair.

24 Q. And was any representation made as to any kind of
25 relationship between Mr. Nielsen and A.J.?

1 A. Not at that time. But a couple days prior to that
2 William had told me that him and A.J. were together.

3 Q. And meaning what?

4 A. That they were dating.

5 Q. They were dating, okay.

6 Did you have any other involvement with Mr. Nielsen
7 and A.J. after that?

8 A. No.

9 Q. I have nothing further. Thanks.

10 THE COURT: Cross-examination?

11 CROSS-EXAMINATION

12 BY MS. PETERSON:

13 Q. So when you went over to that apartment and you saw her
14 in his apartment, you knew that they were engaged in a
15 relationship at that point?

16 A. That's what I had been told, yes.

17 Q. Did you know that Mr. Nielsen was a registered sex
18 offender?

19 A. Yes, I did.

20 Q. Did you contact the police?

21 A. No, I did not.

22 Q. Did you contact anybody with regard to that girl being
23 in his apartment?

24 A. No, I did not. As I was told, she was over the age of
25 18.

1 Q. And did you think that the 12-year-old girl looked over
2 the age of 18?

3 A. I didn't get that good of a look at her. As I said, I
4 was there helping William move a bed frame.

5 Q. Were you able to see any of the bruises or bite marks
6 over her body?

7 A. No.

8 MS. PETERSON: No other questions, Your Honor.

9 THE COURT: Redirect?

10 REDIRECT EXAMINATION

11 BY MR. DONAHOE:

12 Q. Well, I guess it's been raised, the subject of
13 condition. What was the young lady's condition?

14 A. To me, she appeared perfectly healthy. She was sitting
15 in the living room watching TV. She did not appear distressed
16 in any way.

17 Q. Did it appear that she was being held captive?

18 A. No.

19 Q. Would it, in your mind, make sense for an individual to
20 invite you to an apartment where he had somebody being held
21 captive?

22 A. No.

23 Q. Did she appear to you to be in a drugged condition?

24 A. No.

25 Q. Or out of it in any way?

1 A. No.

2 Q. I have nothing further.

3 THE COURT: What did Mr. Nielsen tell you about this
4 relationship? When did it start? Who--

5 A. It started right around the first of January, from what
6 he had told me. And he told me that the lady had almost run
7 him over with her vehicle and that they had started a
8 relationship off of that basis.

9 THE COURT: That the woman that was sitting in the
10 chair almost ran over Mr. Nielsen--

11 A. Yes.

12 THE COURT: --in a vehicle? And did he tell you
13 when that occurred?

14 A. No, he did not.

15 THE COURT: Did he tell you about any phone contact
16 or any other contact with the person?

17 A. No, he did not.

18 THE COURT: Did he have any guy-to-guy talk with you
19 about what kind of sexual activity was going on?

20 A. No, he did not.

21 THE COURT: All right. You can step down.

22 Call your next witness.

23 MR. DONAHOE: Betsy Anderson, please.

24 THE COURT: If you would, please, step up, raise
25 your right hand.

1 (BETSY ANDERSON sworn in.)

2 THE COURT: Take a seat over here, if you would.

3 Would you state your full name for the record.

4 THE WITNESS: My name is Betsy Anderson.

5 THE COURT: And state what your position is and what
6 city you live in.

7 THE WITNESS: I'm an investigator with the Federal
8 Defenders Office and I work out of our Helena branch.

9 THE COURT: Mr. Donahoe.

10 DIRECT EXAMINATION

11 BY MR. DONAHOE:

12 Q. Betsy, you and I work together, correct?

13 A. Correct.

14 Q. And at my request did you conduct an investigation and
15 review extensively the discovery in this case?

16 A. Yes.

17 Q. Included in the Government's papers, was there a
18 toxicology report for A.J.?

19 A. There was.

20 Q. And we have a copy of it with us, don't we?

21 A. We do.

22 Q. And it's a personal document, isn't it?

23 A. Yes.

24 Q. Let's talk about what's not in the report. Is there
25 anything in the report that talks about cocaine?

1 A. No.

2 Q. Anything untoward like Percocet, methamphetamine,
3 anything of that nature?

4 A. No. There was testing for a wide variety of street
5 drugs, prescription medications, date rape drugs. I'm not sure
6 if alcohol was tested or not.

7 Q. But basically it's a pretty clean report, correct?

8 A. Right. It came back negative for everything but THC.

9 Q. The original connection between Mr. Nielsen and A.J. was
10 through a thing called Livelinks. Can you tell me about that?
11 Was there any activity in the investigation you conducted into
12 this Livelinks business?

13 A. I did. When we were preparing for trial, we had our
14 computer technician in Great Falls sign up for Livelinks so
15 that we could get an idea of what kind of a site it was. I did
16 a little bit of computer Internet research on it. It's
17 basically an 18-and-over sex chat line.

18 Q. And is there some kind of registration form or do you
19 sign up to get in?

20 A. It's all over the phone. You sign up and you leave a
21 recorded message that other people can then call in and listen
22 to.

23 Q. And must you be 18 years of age or older to access this
24 Livelinks?

25 A. That is their requirement, yes.

1 Q. And apparently A.J. was accessing it, correct?

2 A. Correct. She had signed up.

3 Q. In the discovery, and maybe through investigation, did
4 you determine whether A.J. had ever accessed Livelinks at times
5 other than with Mr. Nielsen?

6 A. Yes. Considerably.

7 Q. And can you tell me about that?

8 A. She signed up--she got her cell phone, was on December
9 24th, and I believe she registered--it was either December 28th
10 or January 1st. I'm not sure which. December 28th is when she
11 registered.

12 Q. And did she access Livelinks while she was here in
13 Missoula --

14 A. Yes.

15 Q. -- from the cell phone that she was carrying with her?

16 A. Yes.

17 Q. Do you know how much time elapsed from the first call
18 between the two parties until departure on the bus?

19 A. Approximately 56 hours.

20 Q. And how was the trip funded?

21 A. My understanding from the discovery is that she took the
22 money from her mother.

23 Q. Do you know the number of times that A.J. may have
24 accessed the Livelinks line from here in Missoula?

25 A. One time, when I saw the phone records.

1 Q. And how many times on the chat lines otherwise, do you
2 know?

3 A. She was on the chat line a total of 36 calls and
4 510 minutes.

5 Q. One of the objections I wanted to address with His Honor
6 centered on the prior juvenile adjudication of Mr. Nielsen.

7 Can you tell me the parties involved there without
8 using specific names, just relationships?

9 A. The Defendant and a half sister.

10 Q. And from beginning to end, at least from the
11 investigation that you conducted, over what period of time did
12 that adjudication or that conduct transpire?

13 A. One day.

14 Q. And was it in terms of hours, minutes?

15 A. According to the victim, it was about five minutes.

16 Q. Was there any white pills located in any of the pictures
17 that were included in the discovery?

18 A. Yes. There was a bottle of white pills.

19 Q. And did you follow up on that to determine what they
20 were?

21 A. I did.

22 Q. What were they?

23 A. Ibuprofen.

24 Q. And one last thing. Did you make any determination
25 about who accessed the Greyhound service at least to set

1 up--find out when the bus may leave to Missoula and so on?

2 A. There was a call on A.J.'s phone, I believe it was on
3 January 2nd, for about four minutes to the Greyhound 800
4 number.

5 Q. I have nothing further.

6 THE COURT: Cross-examination?

7 CROSS-EXAMINATION

8 BY MS. PETERSON:

9 Q. Did you also look at Mr. Nielsen's records and what
10 calls were made?

11 A. I believe I did, because we got some in discovery, yes.

12 Q. And isn't it true that the Greyhound bus station, both
13 the toll-free 800 number, as well as the local Greyhound bus
14 station, was called from Mr. Nielsen's phone before she
15 traveled?

16 A. It may have. I just recall that they checked his
17 computer and there was no indication that he had looked up
18 anything on the Internet about Greyhound.

19 Q. I have no other questions.

20 THE COURT: Any follow-up?

21 MR. DONAHOE: No, thank you.

22 THE COURT: Thank you. You can step down.

23 Any other witnesses?

24 MR. DONAHOE: No, Your Honor. I'm finished.

25 THE COURT: All right, let's take up your

1 objections. Do them one at a time.

2 The first objection is the issue of whether or not
3 they met on Myspace or Livelinks.

4 I think that's resolved because a forensic review
5 showed that they met--they didn't communicate using Myspace,
6 but they do have a record of chatting and communicating through
7 Livelinks. That's what the Presentence Report says.

8 Is there still an objection to that?

9 MR. DONAHOE: No.

10 THE COURT: All right. The second objection is that
11 the victim claims she was out of it during her time at the
12 Defendant's apartment. However, the toxicology testing looked
13 for a wide variety of drugs and the only drugs they found were
14 marijuana. Is that still an issue?

15 MR. DONAHOE: Well, I think it is in terms of
16 vulnerable victim being held captive and so on. I mean, it's a
17 factual matter. I think it's relevant to that. It goes to
18 that.

19 THE COURT: Okay. Well, whether it is or isn't, I
20 don't think there's a dispute that the toxicology report, the
21 only thing they found was marijuana.

22 MR. DONAHOE: Right.

23 THE COURT: So--

24 MR. DONAHOE: And I think a very small amount, at
25 that. I guess it goes also to the impact statement, which I

1 can discuss later on. We can maybe talk about that in context.

2 THE COURT: Well, is there anything I need to rule
3 on with respect to that?

4 MR. DONAHOE: I don't think so, Your Honor. I think
5 that evidence is pretty clear.

6 THE COURT: All right. Your third objection seems
7 to be one that addresses a legal issue, that's the two-point
8 enhancement, because your suggestion is the crime did not
9 include the use of a computer, so the offense characteristic
10 doesn't apply.

11 MR. DONAHOE: Correct.

12 THE COURT: Okay, what's the argument?

13 MR. DONAHOE: Well, the argument is we don't have
14 his phone. I understand the agent's testimony. But if Your
15 Honor would look at the language that I guess is quoted in the
16 Presentence where the two points are applied, that "if the
17 offense involved the use of a computer to persuade, induce,
18 entice, coerce."

19 So the argument is that you have to use the computer
20 as a computer and I don't know that we have proof of that here.

21 THE COURT: Well, why is that the argument if the
22 law defines a computer as an electronic, magnetic, optical,
23 electrochemical or other high-speed data processing device
24 performing logical, arithmetic or storage problems, and
25 includes data storage facility or communications facility

1 directly related to or operating in conjunction with such
2 device? That seems like that's exactly what the testimony is.

3 MR. DONAHOE: And I don't dispute that. What I'm
4 pulling into the discussion here, Your Honor, is not the
5 definition--the statutory definition, but the specific offense
6 characteristic language.

7 There's got to be some causal connection between the
8 use of that computer and the coercion, inducement, enticement,
9 et cetera. There has to be some factual nexus between those
10 two things. So the device, although it may be considered a
11 computer, it has to be used as such.

12 I think the testimony we have here is that they are
13 talking on the phone. The phone is not being used in any
14 computer sense. It's not filing any data. It's not storing
15 any data. It's not doing anything that a computer would do.

16 THE COURT: The agent says it does. Whenever you
17 make a call, it stores metadata, what the number is, who you
18 call, the length of time. It's precisely what a computer does.
19 The only difference between a computer and the cell phones now
20 is sort of how the information--the electronic information gets
21 from whatever the device is to the other device.

22 MR. DONAHOE: All right, I won't belabor the point.
23 I'm just trying to emphasize that the phone was not being used
24 as a computer. I understand that it is a computer and I don't
25 dispute that. What I'm arguing is that it wasn't used as such

1 to effect the coercion to fall within the terms of the specific
2 offense characteristic.

3 It's kind of like the gun cases where we went
4 through that period of years where guns were being traded for
5 drugs, and there was a series of cases that discussed whether
6 my giving an individual my gun in exchange for drugs was use of
7 the gun. And the discussion centered, and the holdings
8 ultimately centered on doing that is not using a gun as a gun.
9 It's still a gun. I'm not using it as a gun, so I can't be
10 held accountable for that.

11 And I'm trying to overlay that analysis here. I
12 would be completely willing to concede the point if the
13 testimony was, well, we accessed the texting that went on
14 between the two and it was clear that from the discussion, you
15 can just follow it in the texting, that that's what effected
16 her departure from Wyoming. I think there is no question
17 there.

18 But here we can't determine, based on the testimony,
19 whether the coercion was effected by the conversation or the
20 text. There is no text.

21 Agent Shaide seems to concede that the coercion
22 apparently occurred during the conversation. And I'm saying
23 even though the cell phone is a computer, it's not being used
24 as such at the time. It's not storing any data, with the
25 exception of the metadata, any data that's relevant or useful

1 to determining whether the coercion occurred.

2 THE COURT: Well, the cases don't seem to follow
3 that view, do they? The 8th Circuit and the 7th Circuit
4 circuit. You are distinguishing them by saying they are wrong.

5 MR. DONAHOE: No, I'm distinguishing them on my
6 facts. I don't want to quarrel with them. I don't think
7 anybody raised this argument there. And I don't think that
8 those decisions covered this particular point. They don't.

9 Your Honor, I think we have to remember that the
10 operative crime here is the words themselves. A crime is
11 complete once the coercion, enticement, inducement is effected.
12 That's the nature of this crime for which he stands convicted.
13 And that specific offense characteristic language tracks it
14 almost verbatim. There has to be proof of that.

15 On top of which we have this issue lurking out there
16 that in the beginning of this connection between these two
17 individuals, he thinks that she's an adult. So that would have
18 to be sorted out on some level, I think.

19 THE COURT: Well, he pled guilty to this.

20 MR. DONAHOE: Well, I understand that.

21 THE COURT: And he testified that he knew that she
22 was 12 years old 56 hours, roughly, before she came.

23 MR. DONAHOE: And I understand that and I want him
24 to get credit for that. And I'm standing here, and we'll get
25 to it, I suppose, with the Government asking for a sentence of

1 480 months.

2 THE COURT: Yes.

3 MR. DONAHOE: I'm just trying to point out that we
4 did come in and plead guilty. That there were a variety of
5 things that could have been discussed at a trial. I still
6 believe that. But Mr. Nielsen wanted to come in and do it this
7 way, and I think the Court has what information it needs.
8 That's where I stand on the computer issue.

9 THE COURT: All right. Well, let me hear what
10 Ms. Peterson has to say about that.

11 MS. PETERSON: Your Honor, the coercion and the
12 enticement by use of the phone is an entire course of action
13 that took place.

14 What the Defense is trying to do is trying to say
15 that the phone was not used, which frankly is completely
16 impossible. The phone is exactly what was used for this entire
17 offense. It's how he committed the offense.

18 And so, yes, a cell phone is a computer. And, yes,
19 he used that in order to communicate with the victim in this
20 particular case. It included voice calls, but it also included
21 text messaging based on his admission alone. I just don't see
22 any way around how this 2-point enhancement would not apply.

23 THE COURT: All right. I agree with the Government.

24 The Application Notes define computer as that set
25 forth in 18 U.S. Code 1030(e)(1); and that means that the term

1 computer means an electronic, magnetic, optical,
2 electrochemical or other high-speed data processing device
3 performing logical, arithmetic or storage functions and
4 includes any data storage facility or communications facility
5 directly related to or operating in conjunction with such
6 device.

7 The Guideline 2G1.3 says, "If the offense involved
8 the use of a computer or an interactive computer service to
9 persuade, induce, entice, coerce, facilitate the travel of the
10 minor to engage in prohibited sexual conduct, or entice,
11 encourage, offer or solicit a person to engage in prohibited a
12 sexual conduct with a minor, increase by two levels.

13 I think that the Application Note, as well as the
14 Guideline itself and the statute has specific facts here.
15 There is no question that Mr. Nielsen used the phone, which is
16 a computer device, and he used it to entice a 12-year-old girl,
17 that he knew was 12 years old, to come to Montana to engage in
18 sexual activities which actually occurred.

19 So that objection is overruled.

20 Your next objection. We're at No. 4.

21 MR. DONAHOE: No. 4.

22 THE COURT: The vulnerable victim.

23 MR. DONAHOE: Yeah. All right. I think the
24 standard here is unusual vulnerability, and the argument is
25 that there is no showing. The Government hasn't produced any

1 evidence that shows that this individual was unusually
2 vulnerable.

3 THE COURT: What about the testimony that came out
4 this morning that she was troubled? She was in a situation
5 where parental divorce, looking for some solace, activity.
6 Isn't that--for a 12-year-old, I mean.

7 MR. DONAHOE: Your Honor, I guess there are a couple
8 of things. You know, this is a very difficult thing to discuss
9 with the Court because we are talking about somebody that is
10 12 years old.

11 THE COURT: Right.

12 MR. DONAHOE: I understand that and I don't mean to
13 be insensitive. Believe me, I don't. I'm a father, I'm a
14 grandfather, so I'm totally sympathetic to this particular
15 situation.

16 But I think there are some things that we have to
17 discuss here objectively. The first is that I noticed on
18 FindLaw yesterday, and I have a copy of it here, a 12-year-old
19 girl was sentenced for cyberstalking for aggressively bullying
20 another individual.

21 It's not something that I cited in my papers, but I
22 bring it up now to show that various authorities, on occasions
23 that warrant them, can turn the tables on youngsters and
24 prosecute them as criminals. And they do that without
25 compunction and probably justifiably so.

1 And I think that the point that I want to make here
2 is that it's--the vulnerability that arises out of one's age is
3 incorporated into the specific offense characteristics that was
4 added on for her age, so we've already covered that. This is,
5 even at a glance, redundant trying to add in these extra
6 points.

7 The second is that on the facts here we have some
8 problems. We did discuss openly the interviews between
9 Mr. Nielsen and the agents, and A.J. and the agents. And
10 there's something very interesting in the beginning of A.J.'s
11 statement. And this is already in the record in one of the
12 motions that I filed. And I have it here, I have it marked.
13 That statement was before the Court, I think, in the Rule 412
14 process.

15 But in any case, at the beginning of the statement
16 the agents, and I think reasonably so, want to make sure that
17 A.J. has the understanding that she needs to tell the truth.
18 So they run through a series of questions that are pretty good,
19 you know, to test her abilities along that line. And one of
20 the agents, I forget which, says, *You know, this guy here, he's*
21 *my partner and he's my friend and most of the time he's a good*
22 *guy but he can be a creep.*

23 I might have that wrong. He was trying to be, you
24 know, sort of light about it.

25 He said, *If I said that, would that be the truth or*

1 a lie? And very perceptively A.J. says, *It would be neither.*
2 *It would be an opinion.*

3 And I'm just hard pressed with that ability, you
4 know, that she displays at the onset of her statement, then to
5 go on and talk about being sexually active, having used drugs.
6 She claims that she's more mature than the average 12-year-old.
7 And I hasten to add that she was one month away from her 13th
8 birthday.

9 When you look at that contextually with the fact
10 that she went to her mom's purse, took the money, went to the
11 bus depot, arranged for her transportation, for the life of me
12 I can't understand why the authorities at the bus depot or at
13 least the clerk didn't question her, or how she negotiated
14 that. But she gets on the bus and she comes to Montana.

15 They are all things that were done of her own
16 volition and by her own admission so that she could become
17 involved in some drug usage. She was willing to text, to sext,
18 to have phone sex. She accessed that line on Livelinks at
19 times beyond her involvement with Mr. Nielsen. So I don't see
20 the unusual vulnerability.

21 And if the criteria is going to be people of a young
22 age that come from disadvantaged circumstances, that's not
23 unusual, Your Honor. It's ubiquitous. It's everywhere. I
24 mean, percentagewise that you are going to encounter an
25 individual like that who represents herself to be 18 in order

1 to get the ball rolling, that does not comport with unusual
2 vulnerability.

3 And any vulnerability that needed to be taken into
4 account here, and I agree that there was, is taken into account
5 under the heading of her age and the difference between--the
6 age difference between the two, which is noted in the
7 Presentence Report because it raises a presumption of
8 vulnerability.

9 THE COURT: All right. Ms. Peterson.

10 MS. PETERSON: Your Honor, all of the reasons that
11 the Defense is using to try to argue why this enhancement
12 should not be applied is exactly why it should be applied.

13 And I looked for Ninth Circuit case law in this
14 particular area and the only thing that I came up with, Your
15 Honor, was the *United States vs. Evans*, which is 272 F.3d 1069.
16 It's a 2001 case. And it was a Mann Act case where it was a
17 15-year-old girl whose father had died, whose mother was
18 incarcerated and who had worked as a prostitute prior to
19 meeting the defendant. And the Court found that she was more
20 vulnerable than the average minor victim and that supported the
21 enhancement of the defendant's sentence for violations of the
22 Mann Act on targeting a vulnerable victim.

23 And that's exactly the Government's position in this
24 particular case. It is not just her age. It is something
25 above and beyond her age. It has to be something that the

1 Defendant knows about and takes advantage of. And what he knew
2 about almost immediately from their phone contact, and that
3 came out through the Defense's investigator, that they started
4 having contact about 56 hours before she arrived here, he says
5 that he found out she was 12 two to three days before she
6 arrived here. That's the same time frame.

7 He knows immediately that she's 12 and then
8 immediately starts getting into her background. This is a
9 little girl who starts talking about drugs, starts talking
10 about drug use. Starts talking about sex, is actually willing
11 to engage in sex with him. Wants to run away from home. Wants
12 to get away.

13 And who is standing there with open arms but William
14 Nielsen. And it is that specific fact, it's those items that
15 make her vulnerable. That is what opens her up for the
16 Defendant's ability to go after her and to coerce her and
17 entice her, because he knew that she was a troubled little girl
18 that wanted to get away, that would not go and report that a
19 sex offender was talking to her on the cell phone.

20 THE COURT: Well, what do you make of the
21 Application Notes that say do not apply subsection (B) if the
22 factor that makes the person a vulnerable victim is
23 incorporated in the offense guideline?

24 MS. PETERSON: I don't believe that it is
25 incorporated in the offense guideline Your Honor. Because,

1 again, I agree that the age is incorporated into the offense
2 guideline in that it is--the number itself is taken into
3 account, but in this there is something more than her
4 particular age. And with regards to--that's also what takes it
5 out of the double counting issue, Your Honor.

6 With regards to that, one of--the guideline that
7 talks about unduly influencing a minor goes to the minor's
8 voluntariness. It doesn't go to her vulnerability.

9 What this particular enhancement goes to is the
10 Defendant's conduct. It focuses on his behavior, not on her
11 behavior. And in this particular case this victim was opened
12 up and was unusually vulnerable because of everything in her
13 background, and he knew it and that's why he took advantage of
14 it.

15 THE COURT: Well, the example they give is, "The
16 offense guideline provides an enhancement for the age of the
17 victim, this subsection should not be applied unless the victim
18 was unusually vulnerable for reasons unrelated to age."

19 Your argument seems to be that given her age she was
20 vulnerable.

21 MS. PETERSON: It's not, Your Honor. I think it's
22 reasons unrelated to her age. It's her background. It's the
23 fact that she came from a troubled home, was partying, had
24 already had sexual contact with other individuals, wanted to
25 get away, and he was standing there open and ready. It's not

1 just that she's 12.

2 Now, that being said, I don't think that the Court
3 can absolutely just bottle the fact that she's 12 away. I
4 don't know any way to absolutely distinguish the two and not
5 take that into consideration, because certainly a 12-year-old
6 who is seeking to run is different than what a 17-year-old
7 would be.

8 But in this particular case we have the additional
9 factors that make her unusually vulnerable. It wasn't just
10 that she was 12.

11 THE COURT: Right. But if I understand
12 Mr. Donahoe's arguments--and I understand that he is trying to
13 do it in a fashion that is not accusatory of a 12-year-old
14 girl. But if you look at the objective facts and if you go to
15 seventh grade or sixth grade and pick out a girl and say, *I*
16 *want you to make arrangements for getting on a Greyhound bus.*
17 *I want you to figure out how you are going to finance it. I*
18 *want you to--*

19 I've never even heard of this whatever service it
20 was that they got connected, to know how to do that, use it.
21 In addition to her own descriptions as being not like an
22 ordinary 12-year-old person, and that the things you are
23 pointing out: Her sexual activity, her activities as it
24 relates to controlled substances, that's not your typically
25 vulnerable 12-year-old girl.

1 MS. PETERSON: But it is, Judge, if you think about
2 it from the standpoint that those items are what make her
3 vulnerable. And that's why I pointed the Court to the *Evans*
4 case that talk about the fact that this girl was already
5 engaged in prostitution and came from a problem--a broken home
6 where--that she had parental issues.

7 Because, again, we wouldn't be dealing with an
8 unusually vulnerable victim if it was someone who had a really
9 strong connection, who was not willing to make the leap, I
10 guess, that she was.

11 And that's what the Defendant preyed on, was the
12 fact that she was into these things and did have this kind of a
13 background and was willing to party with him, to use their
14 words and not my words.

15 But, you know, I don't think it's unusual--if we
16 focus on the age, it's certainly not unusual for a 12-year-old
17 girl to think that they are more mature than the average person
18 or anything like that, Judge. You know, the 12-year-old girl
19 is just done with junior high, getting ready to go into high
20 school. And so they are not quite there yet they think they
21 are, when in reality they are completely naive and don't know
22 anything.

23 With regard to all of the victim's actions leading
24 up to her getting to Montana, I think it's really important to
25 keep in mind that the Defendant was the one who was engaged in

1 helping her along the entire way. The records that show that
2 the Defendant was the one who was calling the bus station and
3 she didn't know how to get the money and she didn't know how to
4 get up there, but she, you know, she used his last name. He
5 was helping her every step of the way. This was not just some
6 little 12-year-old girl who just arrived and came to this
7 entire--this entire travel, this entire trip all by herself.
8 He helped her. He gave her the ideas. He gave her the phone
9 numbers. He was standing at the bus station ready and waiting
10 for her.

11 THE COURT: All right. I'm going to reserve on that
12 until we get to the next one.

13 MR. DONAHOE: Judge, I didn't know the *Evans* case,
14 but I did find a case called *Luca*, it's at 183 F.3d 1018.

15 And in Footnote 5 the Court says, "We reject the
16 argument that a person of advanced age or extreme youth is by
17 that fact alone unusually vulnerable without regard to
18 individual characteristics," and they go on and give a couple
19 of illustrations.

20 I just want to close up on that by saying that
21 almost mantra-like I listened to these interviews. And the
22 agents were sort of just totally flummoxed, you know, when they
23 were talking to Mr. Nielsen. And it--just time after time, *But*
24 *she was 12, but she was 12.*

25 And I understand that we have a fixation on that,

1 and justifiably so, but that's already been taken into account
2 and it doesn't make her unusually vulnerable.

3 I think the last one, Your Honor, is--

4 THE COURT: 4B1.5, never convicted.

5 MR. DONAHOE: Right. That's pretty up and down for
6 me, Judge.

7 THE COURT: Have you seen the judgment?

8 MR. DONAHOE: What judgment?

9 THE COURT: Against Mr. Nielsen.

10 MR. DONAHOE: No. They wouldn't disclose it to us.

11 THE COURT: Do you want to see it?

12 MR. DONAHOE: Yes.

13 THE COURT: I've highlighted a couple portions on
14 the first and second page.

15 MR. DONAHOE: I don't think it affects my argument,
16 though. It really doesn't.

17 THE COURT: I thought your argument was he hadn't
18 been convicted.

19 MR. DONAHOE: Well, convicted in the sense as an
20 adult. He was never convicted as an adult. He was adjudicated
21 a delinquent. I think under Montana law under *Hastings* and
22 under Ninth Circuit law, that is clearly not an adult
23 conviction.

24 THE COURT: Well, "The youth then admitted to sexual
25 assault in violation of Section 45-5-502(1) and (5)(b) of

1 Montana Codes Annotated, as defined in Section 45-2-101(66)(b)
2 and 45-5-501(1)(b)(iv) MCA."

3 Then it says, "Based on the youth's admission, this
4 court found the youth to be a delinquent youth and scheduled a
5 dispositional hearing."

6 MR. DONAHOE: Right, and I don't think it changes my
7 argument. Maybe I'm not getting my point across here.

8 But if we just used the Guidelines here--I'm in the
9 2010 green book at Page 379 under 4A1.2d. And there's language
10 there that says, "If the Defendant was convicted as an adult
11 and received a sentence of imprisonment," et cetera, "add three
12 points."

13 THE COURT: What page? You are not at the right
14 book.

15 MR. DONAHOE: 379. I'm in the green book.

16 THE COURT: 379, that's not the same thing on mine.

17 MR. DONAHOE: 4A1.2d. I don't think the language
18 has changed.

19 THE COURT: Well, the Guidelines 4B--

20 MR. DONAHOE: I understand that. I'm just making a
21 distinction here between an adult conviction and a juvenile
22 adjudication.

23 If you compare the subparts of 4A1.2d, you'll notice
24 the Sentencing Commission recognizes a distinction between a
25 juvenile who's convicted as an adult and a juvenile who is

1 treated as a juvenile.

2 THE COURT: Okay. So what's your objection?

3 MR. DONAHOE: So my objection is, if the Sentencing
4 Commission in Chapter 4 recognizes the distinction between a
5 juvenile who was treated as an adult and a juvenile who was
6 treated as a juvenile, and then later in the same chapter, at
7 4B1.5, says, "In any case in which the Defendant's instant
8 offense of conviction is a covered sex crime, career offender
9 does not apply," both those circumstances are met here, "and
10 the Defendant committed the instant offense of conviction
11 subsequent to sustaining at least one sex offense conviction."
12 Conviction.

13 THE COURT: I'm not understanding your argument. So
14 the Application Note is a career offender, that's 4B1.5. 4A1.2
15 has to do with criminal history.

16 MR. DONAHOE: Right. And criminal history tells us
17 that there's a distinction between--

18 THE COURT: But that's for counting points on the
19 criminal history.

20 MR. DONAHOE: I understand that. But they use the
21 same language, Your Honor, and they are not drawing a
22 distinction. They are not pulling in both of those subparts of
23 4A1.2d.

24 A juvenile adjudication is a juvenile adjudication.
25 In order for 4B1.5b to apply, subpart A, it should read "sex

1 offense"--"at least one sex offense conviction or
2 adjudication." It should say that and it doesn't.

3 THE COURT: Well, that's my point. That's for
4 criminal history. We're talking about dangerous sex offenders,
5 that's what 4B1.5 is.

6 And what your argument is, is that you could have a
7 serial rapist who is a juvenile that gets adjudicated nine
8 times for being a serial rapist and he wouldn't be considered a
9 dangerous sex offender.

10 MR. DONAHOE: That's exactly the argument.

11 THE COURT: It doesn't make sense.

12 MR. DONAHOE: Well, Your Honor, it doesn't--we have
13 to go by what the Sentencing Commission did here. It says sex
14 offense conviction.

15 THE COURT: You are talking about two different
16 parts of the Guidelines.

17 MR. DONAHOE: Well, but it says conviction. And
18 under both Montana law--and I cited the case in the memo,
19 *Hastings*. Under Montana law that adjudication is an
20 adjudication. He was adjudicated a delinquent. He wasn't
21 convicted of an offense.

22 THE COURT: Is he a registered sex offender?

23 MR. DONAHOE: Yes, he would have to be under SORNA.

24 THE COURT: Yeah. And so that's based on what, an
25 adjudication?

1 MR. DONAHOE: An adjudication, because there is
2 specific language in the statute that converts the adjudication
3 to a conviction. There is no such language in these
4 Guidelines. The distinction is continuously recognized.

5 THE COURT: Where is the language in 4B1.5 that
6 supports the argument you are making?

7 MR. DONAHOE: It's the absence of language. It says
8 conviction. It doesn't say adjudication. He has to have a sex
9 offense conviction.

10 THE COURT: What specific point are you making out
11 of 4B1.5? Give me a citation to the exact place you are
12 looking.

13 MR. DONAHOE: I'm looking at 4B1.5, subpart A. And
14 the last phrasing that begins with "and."

15 "And the Defendant committed the instant offense of
16 conviction subsequent to sustaining at least one sex offense
17 conviction." That's a term of art. Conviction doesn't mean
18 juvenile adjudication.

19 THE COURT: Well, is the word "conviction" defined
20 in part B?

21 MR. DONAHOE: Well, it's not. But if you look down
22 at sub B, which I say does apply, the pattern, it's pulled in
23 there.

24 THE COURT: 18 U.S. Code.

25 MR. DONAHOE: It's not that it's not countable or it

1 can't be used.

2 THE COURT: Well, what about the definition in 2426
3 in Title 18 and the Application Note, "Sex offense conviction
4 means an offense described in 18 U.S. Code 2426(b)(1)(A) or
5 (B)"?

6 And (b)(1)(B) says, "Under state law for an offense
7 consisting of conduct," that would have been under a chapter
8 referred to in Paragraph 1, "If the conduct had occurred within
9 the special maritime territorial jurisdiction of the United
10 States."

11 MR. DONAHOE: All right. And it wouldn't be. It
12 wouldn't have been. It wouldn't have been under federal law.
13 I mean, even under federal law what Your Honor has before you
14 there in the judgment would still be a juvenile adjudication
15 under 5032.

16 So even a retrospective look, it still would have
17 been a federal juvenile adjudication. There was no way that he
18 could have been moved into adult court under 5032.

19 THE COURT: There is no way?

20 MR. DONAHOE: No. For that offense?

21 THE COURT: For that offense.

22 MR. DONAHOE: For that offense. If we assumed all
23 of the federal circumstances existed, jurisdictional
24 circumstances existed, under the federal Juvenile Delinquency
25 Act he could never have been waived into adult court.

1 And subpart A of 4B1.5 requires a sex offense
2 conviction, not an adjudication.

3 THE COURT: Well, your argument doesn't make sense
4 to me in light of the analogy that I postured for you, and that
5 is he could have been convicted of serial rape nine times. He
6 could have been adjudicated nine times and that wouldn't--

7 MR. DONAHOE: As a juvenile and then he would fall
8 within (B). It would be a pattern of sexual activity.

9 THE COURT: All right. Well, let's hear what the
10 Government has to say.

11 MS. PETERSON: Your Honor, we believe that the PSR
12 has correctly applied it and that it does apply.

13 It's interesting because Mr. Donahoe's directing the
14 Court to 4.1--4B1.2 was actually something I was going to do,
15 Your Honor. And that is to say that when the Commission means
16 adult conviction, they say adult conviction, and that's exactly
17 what they did in 4B1.2 when they are defining a career
18 offender.

19 But as the Court correctly points out, we're not
20 talking about the definitions for a career offender. We're
21 talking about the definitions that apply to repeat and
22 dangerous sex offenders against minors.

23 And if the Court goes to the definition in that
24 section that applies to that Guideline and not the one that
25 applies to the career offender guideline, it says sex offender

1 convictions means any offense. Certainly that offense applies.

2 THE COURT: What Guideline are you talking about
3 now?

4 MS. PETERSON: 4B1.5.

5 THE COURT: Yes.

6 MS. PETERSON: It's everything that the Court has
7 already pointed out, Your Honor. It's the Application Note 3
8 that specifically defines what they mean by sex offender
9 conviction. And it specifically says--you know, the Defense is
10 arguing this is a term of art. He's correct, it is a term of
11 art. And it's a term of art that the Commission has defined
12 and they have defined it by meaning any offense. They don't
13 say any adult conviction like they do under the career
14 offender. It clearly meets the definition it sets forth in
15 Application Note 3 and, therefore, we believe that it applies.

16 Trying to use the definition that is set forth in
17 juvenile male or a Montana Supreme Court case to say that it's
18 an adjudication instead of conviction is like comparing apples
19 to oranges. It's appropriate to use the definition that is
20 within the particular guideline that we're talking about. And
21 within that guideline, that prior sex offense should count.

22 THE COURT: Well, we're going to take a ten-minute
23 break here, but I think that the Government has the better
24 argument as it relates to the last objection. And I don't
25 think that Mr. Donahoe's argument stands up for the reasons

1 that the Government has just articulated and for those
2 reflected in my questions.

3 I understand his argument, but it doesn't make
4 sense. Here the Defendant was adjudicated of being guilty of,
5 based on his admission, sexual assault as defined under Montana
6 law.

7 For purposes of calculating his criminal history, I
8 think Mr. Donahoe is correct. It would be inappropriate to
9 count that in a fashion as one would with an adult.

10 But when it comes to the application of 4B1.5,
11 Repeat and Dangerous Sex Offender Against Minors, the
12 individual that was involved in the State matter was a
13 12-year-old. The individual here is a 12-year-old. I do not
14 think you could go to the Sentencing Guideline Commission and
15 say, *We have this gentleman who sexually abused a 12-year-old*
16 *when he was not an adult. And now he's abused another--*
17 *sexually abused another 12-year-old as an adult, but we don't*
18 *think that's a repeat or dangerous sex offender.* And I don't
19 think the argument holds water.

20 We'll take a ten-minute recess and then we'll be
21 back.

22 (In recess at 12:11 p.m., reconvened at 12:25 p.m.)

23 THE COURT: Please be seated.

24 Well, the unresolved issue right now is the
25 application of 3A1.1(b)(1), and that enhancement applies to

1 individuals who are unusually vulnerable.

2 I've listened to the evidence here and read the
3 Presentence Investigation Report and listened to the arguments
4 made by both Mr. Donahoe and by the United States. And I
5 confess that it is a very difficult question when you focus in
6 on details, because I think the details here can demonstrate
7 that she is unusually vulnerable. I also think there's a
8 reasonable argument that she is unusually precocious.

9 If you consider the arguments and the factual
10 matters that Mr. Donahoe has articulated, I think it would not
11 be error to say that this young woman was not a
12 vulnerable--unusually vulnerable victim.

13 On the other hand, in weighing all of the proof I
14 think it is more likely that she is an unusually vulnerable
15 person or victim. It would be much easier if it was a physical
16 issue, that she was in a wheelchair or incapacitated
17 physically. It would be much easier if she were incapacitated
18 or had diminished capacity intellectually. But here the
19 arguments and the facts that are made and the predicate of the
20 Government's argument is the social aspect of this young
21 person.

22 But when they are considered in the context of the
23 conduct of Mr. Nielsen, I think they do lend themselves to the
24 conclusion that she was an unusually vulnerable victim. She's
25 from a broken home. She was on an Internet--or not an

1 Internet--some sort of Livelinks or Livelinks sex thing where
2 she had to be 18 to get on there. In a short time Mr. Nielsen
3 found out she was 12. He found out she was from a broken home.
4 He found out that she's destitute or that she is bored. He
5 knows that she's been sexually active. He knows that she's
6 12 years old. He knows that she is interested in marijuana.
7 He has marijuana. He arranges and helps arrange the bus trip
8 for her. She uses his name and his guidance in terms of the
9 activities that she engaged in in arranging the transportation,
10 and not to mention the fact that she was 12 years old or, as
11 Mr. Donahoe points out, 12 years and 11 months.

12 I believe that the facts here, and not just her age,
13 demonstrate that she is an unusually vulnerable person.

14 I can say, and I don't know how this stacks up
15 against "unusually," but I do know that in 15 years of doing
16 this, whether it's drug offenses, whether it's sex offenses,
17 whether it's gun offenses, whatever the nature of the offenses
18 are, it is not unheard of that the Defendant, who is standing
19 there as an adult, comes from a very troubled background and
20 broken homes, and that it--that vulnerability of children in
21 the age between 8 and 15, I think they are unusually vulnerable
22 to undue influence either by peers, adults or illicit
23 activities.

24 I don't know what the psychological explanation is,
25 but I do believe in this case that A.J. was an unusually

1 vulnerable 12-year-old girl. So the objection is overruled.

2 And I don't think there are any other objections to
3 rule on, are there, Mr. Donahoe?

4 MR. DONAHOE: No, Your Honor.

5 THE COURT: If there are no more witnesses, then
6 I'll recognize you to allocute on behalf of Mr. Nielsen. I
7 think you are aware that did I give notice under--I don't think
8 it's required for variation, but I did give notice under 32(h),
9 which has to do with departures from Sentencing Guidelines.

10 But in order to give Mr. Nielsen the benefit of
11 anticipating what might occur, and for you to have put together
12 whatever arguments you think would be appropriate, I have given
13 notice that I am contemplating an upward variation from the
14 Guidelines, which I should probably state.

15 The statute says the minimum here is ten years of
16 imprisonment, the maximum statutory imprisonment is 11--or
17 excuse me--is life imprisonment. The Guidelines, as
18 calculated, are 235 to 293 months. Mr. Nielsen is not eligible
19 for probation by statute or the Guidelines. Supervised release
20 is no less than five years and up to life. The Guidelines
21 recommend the same range. He could be fined up to \$250,000.
22 The Guideline range is \$17,500 to 175,000. Restitution here,
23 which we've not discussed but there is no objection to it, is
24 \$7,305; that's by statute and Guideline. The special
25 assessment is \$100.

1 It will cost the American taxpayers between \$554,000
2 and \$690,000 to incarcerate Mr. Nielsen if he's incarcerated
3 within the Advisory Guideline range and another at least
4 \$19,600 for supervised release.

5 I'm sorry I didn't say that earlier, but you may
6 proceed now. If you would like, Mr. Nielsen can join you.
7 I'll give him an opportunity to speak after you, Mr. Donahoe.

8 MR. DONAHOE: Thank you, Your Honor.

9 Your Honor, considering the Guideline range, we
10 would ask for a sentence of 240 months. It's 20 years in
11 prison. It's more than adequate, I think, in a punitive sense.
12 It serves protection of the public. It gives Mr. Nielsen an
13 opportunity to reorient his behavior by accessing prison
14 programs. He'll be 45 years old or thereabouts when he's
15 released. Probably a little less counting for the good time.

16 This is a unique way to approach this, but I think
17 it needs to be said. The Government, I think, in its totality
18 has been pretty aggressive about prosecutions in the sex
19 offender area. In particular, the federal government has
20 become a real presence in that area, something that 20 years
21 ago was pretty routinely left to the states, except for Indian
22 reservations.

23 And I think what we have to account for that is the
24 nature of the technology now and how people can communicate,
25 and that's precisely why Congress passes laws like these so

1 that individuals can be detected and apprehended and punished.

2 And I think the hope is, inferentially from all of
3 that, we can conclude that a certain segment of the population
4 will be identified and incarcerated and, therefore, over the
5 long-term society will be protected.

6 But I also think that it should be noted that as
7 part of its weaponry, or as part of one of the many tools that
8 the Government has at its disposal now to deal with issues such
9 as these is the civil commitment aspect. And what's
10 interesting about that is that it arose, I'm going to say,
11 within the last decade and it came basically from the state
12 systems were starting to do it. Where people would reach the
13 end of their prison terms and then the state or that particular
14 sovereign would move and say this individual still represents
15 some kind of danger that we think is sufficient to warrant his
16 continued incarceration.

17 Now, of course, in those circumstances they move
18 them over maybe to a different kind of facility, he or she gets
19 care and so on.

20 But the United States is on board with that
21 paradigm. And we now have individuals that are identified
22 while they are doing their incarceration, and at the end of
23 terms the United States is at liberty to make an allegation
24 that a particular individual is in need of further treatment or
25 poses some kind of danger to society and should be dealt with

1 in that fashion. And I think that that's relevant here.

2 As a lawyer handling cases like these it's difficult
3 because it draws attention, which defense attorneys don't like.
4 At least good ones, I know. And it, I think deservedly, raises
5 the attention of the public and people are interested in them.
6 And they almost always, always greatly concern the Court. So,
7 you know, they present a set of challenges that are just a
8 little bit different.

9 But having said all of that, generally the
10 overriding sentiment is always, in a case like this, this
11 individual needs to be punished. And I think that really is
12 the overriding consideration here.

13 And really where I'm going with this, Your Honor, is
14 just that we need to put some kind of distinction or draw some
15 kind of distinction between protecting the public now and the
16 punishment component under 3553(a), and recognizing that a
17 20-year sentence is sufficient but not greater than necessary
18 to fulfill all of those factors. And that later in time if it
19 does prove to be necessary, there is certainly opportunity for
20 the United States to make its allegation in a civil commitment
21 setting if that's necessary.

22 In some ways--and you are just going to have to
23 forgive me, please, for saying this--it maybe looks worse than
24 it actually is. When you consider in totality his background,
25 the fact that he comes to this with that prior juvenile

1 adjudication, that's kind of a game changer, I think, for him
2 as an individual defendant.

3 The rest is really what's going on in the country.
4 We have all kinds of kids using drugs, dropping out of school.
5 You know, across-the-board, and I won't get into that in depth,
6 but we have real problems there. Our educational institutions
7 and families are failing us. A third of high school
8 individuals drop out. We can't be competitive. We're really
9 kind of behind the eight ball there. But, you know,
10 advertising.

11 Your Honor used the word, which I thought was really
12 kind of profound here, precocious. We want our kids to grow up
13 faster, you know. It's the rare family now that, you know,
14 kind of keeps them sheltered and protected. And it's hard to
15 do. Even those that try, it's hard to do. They kind of hit
16 the street earlier now.

17 So having said all that, I can tell you Mr. Nielsen
18 is really, really sorry and I think he's going to convey that
19 to the Court. There was some discussion about how he tried to
20 minimize. And he did, I'll grant that. But in the end I think
21 everyone did get a clear picture from his admissions. He saw
22 no sense--and really brought the subject up on his own, but he
23 saw no sense in having a trial.

24 And he was with me while I was giving him advice.
25 He understood and he didn't quarrel. And he never turned on

1 me. You know, sometimes you get that: *Well, gees, it's your*
2 *fault. If I had a better lawyer. If I had this. If I had*
3 *that.* He's been nothing but grateful for the work that Betsy
4 and I have done for him. I think every call or visit that I've
5 ever had with this man, he's expressed some kind of gratitude
6 for helping him. And I think that speaks to some element of
7 his character that shows that he's not beyond redemption, on
8 top of which he's a pretty smart guy. And I think after
9 sitting for 20 years in prison and being pretty close to
10 50 years old, I think we'll see a different individual here.
11 Thank you.

12 THE COURT: Thank you.

13 William Richard Nielsen, you have a right to speak
14 on your own before I impose sentence. Do you want to exercise
15 that right?

16 DEFENDANT: Yes, sir.

17 THE COURT: You may proceed.

18 DEFENDANT: I honestly regret what I have done. I
19 can't expound on how sorry I am. And maybe I should have
20 sought better help before it happened, but I didn't and for
21 that it's something I've got to live with.

22 All I can say is that I am sorry to A.J. for what
23 I've done and for how it's affected her. And it's something
24 I'm going to have to live with for the rest of my life, as well
25 as her. I can learn from my mistakes and hopefully I'll be

1 given a chance to. That's all I have to say, Your Honor.

2 THE COURT: Thank you, Mr. Nielsen. You may be
3 seated.

4 Ms. Peterson.

5 MS. PETERSON: Thank you, Your Honor.

6 I want to first start out by talking about the
7 Defense's statement that it really looks worse than it is. I
8 could not disagree with that more. It is every bit as bad as
9 it looks. And that came through in both Agent Shaide's
10 testimony, as well as the Defendant's testimony when he talked
11 about the violence that he inflicted on this little girl over
12 the course of four to five days after getting her up here from
13 Wyoming. It's absolutely horrendous.

14 If the Court were to listen to the Defendant in that
15 interview, it's somewhat similar to today in his testimony. It
16 is completely cold and devoid of all emotion whatsoever. When
17 you listen to that tape recording, it is just chilling. When
18 he sits there and talks about how he did not tie her up because
19 he didn't have enough rope and gets into how he's a light
20 sadist and a bit of a masochist and he knows that for a decent
21 restraint you need six to eight feet. He talks about these
22 things like the normal person would read off their grocery
23 list, Your Honor. He talks about slapping her and biting her
24 and choking her because, as he says today, because she wanted
25 it. Because this 12-year-old victim wanted it.

1 What goes on in his mind is absolutely astounding.
2 And he talks about how he's really sorry. And I'm sorry, Your
3 Honor, but as you read through the PSR and you read through the
4 sex offender evaluation and the polygraph, I don't buy it. I
5 don't think he is at all. I think that he has minimized, not
6 just at the very beginning when he was caught. But as you read
7 through the sex offender evaluation and the polygraph, he
8 minimizes all the way through that right up to the question
9 where they said, *Do you remember the victim telling you that*
10 *she was 12?* No. He lies after he's already admitted. He
11 consistently minimizes all the way through in order to not be
12 held responsible for his actions.

13 If you look at the evaluation that Dr. Scolatti did,
14 that is also consistent throughout that. It talks about, on
15 the PPIR score, that the subscore indicates that the Defendant
16 perceives himself as the innocent victim and rarely takes
17 responsibility for his actions.

18 And that's what's portrayed throughout his interview
19 and that's what's portrayed throughout his testimony here, is
20 that somehow in his mind this is what the victim wanted and he
21 was just going along with her and now he's going to have to
22 live with it as well as she is.

23 Well, he is right. He has impacted this little girl
24 for the rest of her life. He impacted her mind, her body, and
25 her soul, and it's something that she's going to have to live

1 with.

2 The Government's asking for 480 months, Your Honor.
3 And I realize, as we've set out in the Sentencing Memorandum,
4 that that is a variance above the Guideline range. But based
5 on the Defendant's characteristics and his history, and
6 especially the characteristics and the conduct in this
7 particular case, it's absolutely warranted and justified.

8 It's not just about punishment. It also is about
9 protection. This is an individual who started treatment four
10 different times and didn't complete it; that's in the PSR.

11 This is an individual that Dr. Scolatti says,
12 "Treatment will be fairly challenging, with a difficult
13 treatment process and the probability of reversals. He's not
14 likely to learn from his experience."

15 It's also an individual that, based on the violent
16 recidivism scales, he falls into the highest third for
17 offenders on violent crimes.

18 With regards to risk designation on the sexual
19 recidivism rate, it's moderate to high. He has poor impulse
20 control. He acts recklessly and he's irresponsible.

21 Everything in the evaluation points to the absolute
22 need to incapacitate this Defendant for a very long, long
23 period of time. And they point consistently to the victim in
24 this particular case.

25 And the only thing that I would like to say on that,

1 Your Honor, is that the victim's naivete comes through when you
2 think about the fact that she was willing to travel to the
3 State of Montana to a registered sex offender for love.

4 Your Honor, I know that the Court has thoroughly
5 reviewed everything in this case and I know that the victim's
6 parents are going to speak and, frankly, they can probably say
7 everything much more eloquently than I am saying.

8 But the bottom line is, in this particular case,
9 that this is a despicable crime that was committed by a
10 depraved individual and we believe that 480 months, followed by
11 lifetime supervised release, is absolutely required.

12 The other thing, Your Honor, that I would simply
13 point out so that it's not missed, is that pursuant to the plea
14 agreement the Defendant agreed to commit to testing for
15 sexually transmitted diseases and release the results. And we
16 would specifically request that the Court include that as a
17 directive to the Bureau of Prisons under the Judgment so that
18 we can be sure that that is addressed. Thank you, Your Honor.

19 THE COURT: All right. Under the Crimes Victims'
20 Rights Act under subpart E, which is the definition, it is,
21 "For purposes of this chapter the term 'crime victim' means a
22 person directly and proximately harmed as a result of the
23 commission of a federal offense or an offense in the District
24 of Columbia. In the case of a crime victim who is under
25 18 years of age, incompetent, incapacitated or diseased, the

1 legal guardians of the crime victim or representatives of the
2 crime victim's estate, family members or other persons
3 appointed as suitable by the Court may assume the crime
4 victim's rights under this chapter."

5 It's my understanding that there are two--the two
6 parents of the minor that was involved would like to address
7 the Court. Is that true? Is it Jeff?

8 MR. JARAMILLO: Yes, Your Honor.

9 THE COURT: If you'd come up to the podium and state
10 your full name, if you would.

11 MR. JARAMILLO: William Jeffrey Jaramillo.

12 THE COURT: Jaramillo? How do you spell that.

13 MR. JARAMILLO: J-A-R-A-M-I-L-L-O.

14 THE COURT: Mr. Jaramillo, under the law you have a
15 right to speak before I impose sentence. You may proceed.

16 MR. JARAMILLO: I don't know if you really
17 understand how many people you have infected with your
18 sickness: My family, her mother's family. You've taken my
19 little girl from me. She'll never be the same. None of us
20 will ever be the same.

21 This is a disease. A sickness, a disease, man. In
22 nature's way, in pride's way, those animals, they get rid of
23 diseased animals so they do not contagiously (sic) the rest of
24 the pack. They have seen this already with your own blood.
25 This is a disease that does not have a cure.

1 You destroyed my daughter. She had issues before.
2 She has major issues now. I can't even hold my daughter no
3 more. I just want to understand.

4 There is no cure for your disease. There is no
5 cure. The sad part is you are a young man and our society is
6 going to give you the opportunity to do this again. My only
7 regret is I can't be 20 years younger, man.

8 Your Honor, whatever punishment this man has will
9 never be enough. I don't believe one bit that this man can be
10 rehabilitated or anything else. Just gives him time to sit and
11 think. Whatever punishment this society can give to him, we
12 will have to just be with that. There is no cure for this
13 disease these people have.

14 THE COURT: Thank you.

15 Ma'am, would you state your full name, please.

16 MS. MARSHALL: My name is Bobbi Jo Marshall.

17 THE COURT: You may proceed.

18 MS. MARSHALL: This crime has affected me and my
19 family in many, many ways. I've sat here today and I've
20 listened to a lot of facts and a lot of evidence, but there
21 were a few things that I endured and that I seen that was not
22 mentioned that I think need to be heard.

23 We had to pose as another 12-year-old child to
24 locate and find my daughter. He thought that another
25 12-year-old girl was running away and he took advantage of

1 that, and this is the only reason why I have my daughter today.

2 My daughter is very suicidal and she'll never be the
3 same. This crime has not only affected her, but it's affected
4 everyone that loves her. And I just beg that the Court never
5 gives him a chance to hurt another child or their family like
6 that again, and I want you to know that.

7 THE COURT: Thank you.

8 The way the process works is that I have calculated
9 the Guidelines and determined what they are over the objection
10 of Mr. Donahoe on behalf of Mr. Nielsen, and the Advisory
11 Guideline range is 235 to 293 months. I have given notice to
12 Mr. Donahoe, as well as to Mr. Nielsen, and I did that on the
13 7th day of June, that I was considering an upward variation
14 from the Advisory Guideline range. The Guideline range is
15 simply a statistical compilation of information and without
16 consideration of the details of William Richard Nielsen. It is
17 an abstract from statistics throughout the United States.

18 And in the abstract, the Guidelines, which are
19 advisory, are 235 to 293 months. I believe that is inadequate.
20 And I do so having considered a multiplicity of matters,
21 including the detailed psychosexual evaluation of Michael
22 Scolatti, the briefing that's been filed in this case, the
23 Presentence Investigation Report, as well as the testimony that
24 was presented here today, the arguments of Mr. Donahoe which I
25 think are always cogent and respectful, as well as the

1 arguments made by the United States.

2 So at this point the question becomes whether or not
3 a sentence within the Advisory Guideline range, which is not a
4 presumptive sentence, but the question to be asked is what is a
5 sufficient but not greater than necessary sentence to
6 accomplish the goals that the Congress of the United States has
7 set for purposes of imposing sentence on any individual.

8 The nature and circumstances of the offense and the
9 history and characteristics of William Richard Nielsen
10 basically go hand in glove. Mr. Nielsen is a pervert. He's
11 been so since he was a young man. And in this case he enticed
12 a 12-year-old girl that he met on Lavalife, knowing she was
13 12 years old, engaging in phone sex with her, and then not only
14 encouraging her and enticing her to come to Montana, but
15 revealing that he is a registered sex offender and knowing that
16 she was 12 years old.

17 He was somebody who had the medical marijuana and
18 enticed her not only with drugs but also with sex. And it's
19 hard to believe that an adult, 25 years old, knowing that he
20 was talking to a 12-year-old, would proceed simply by saying,
21 "It can be our secret."

22 When she got to Missoula, he was there at the bus
23 station, took her to his apartment and then he denies that he
24 kept her there. The testimony presented is that there were
25 periods during the days that she was at the apartment that he

1 was not present. And one wonders why she didn't use the phone
2 that she had or leave the premises, but that I think goes to
3 the entire issue of what was going on with sex and drugs.

4 Mr. Nielsen was engaged in what he rationalizes as
5 soft masochism and abused her physically, slapping her,
6 slapping her on the breast, on her bottom, on her genitals. He
7 was--but for, I guess, not having the right length of rope, he
8 would have tied her up, and who knows what he did.

9 By his own testimony when he was in his apartment
10 with her, she was unclothed and naked. The record reflects
11 that there was repeated sexual encounters to the point that she
12 would bleed. The police found evidence of her bruising on her
13 back, on her wrists as if she had been tied or handcuffed.
14 It's apparent from the information provided that there were
15 sexual devices that may have been involved. And all of this
16 took place while Mr. Nielsen was so much--15 years older than
17 she was. She was 12 years old.

18 He's never been married, although there's a question
19 of what relationships he's had with women. He's not fathered
20 any children. He was raised in Washington and then moved to
21 Montana at the age of 13. When he was 15 years old, he
22 assaulted sexually his 12-year-old half sister and, as a
23 consequence, ended up in the Montana Department of Corrections
24 until he was 18 years old. When he was released, he was on
25 status and was a registered sex offender. He was required to

1 participate in sex offender treatment. And I think the record
2 reflects that on four separate occasions he made a half-sincere
3 effort and dropped out of all of that sex offender program.

4 He has undergone a psychosexual evaluation and a
5 polygraph. The polygraph administered by Donald Bell reflects
6 that Mr. Nielsen was not telling the truth in response to three
7 simple questions.

8 Dr. Scolatti's report is lengthy and sets forth a
9 number of observations and conclusions that indicate that, in
10 this case, William Richard Nielsen is a high risk to reoffend.
11 That he is unlikely to be subject to rehabilitation or to
12 treatment given his attitude and past failures and the
13 incidents that he's had with violent sex, as well as his prior
14 convictions.

15 And I do note as an aside that one of the things
16 that came up--I've not listened to the tapes of the interviews,
17 but Ms. Peterson characterized them as cold, and I think that's
18 reflected in the Presentence Investigation Report.

19 My own observation of him today when he was
20 testifying, is that it was sort of a routine thing, no big
21 deal. In response to Mr. Donahoe's questions, a number of
22 times he did nothing more than shake his head and had what I
23 perceive as a flat affect in response not only to Mr. Donahoe's
24 inquiries but also to those of Ms. Peterson. And, frankly, I
25 didn't find him very believable.

1 The psychosexual evaluation, on a number of pages,
2 reflect that Mr. Nielsen gave inconsistent and invalid
3 responses to some of--his inconsistent responses made some of
4 the testing invalid. While he proclaimed to have an interest
5 in treatment, Dr. Scolatti made the observation that treatment
6 would be fairly challenging, with a difficult treatment
7 process, and the probability of reversals. There are other
8 matters in the Presentence Report--or excuse me in Dr.
9 Scolatti's report, some of which is in the Presentence Report.
10 Mr. Nielsen lacks self control. He lacks remorse. He's
11 impulsive. He's reckless. He likes to be on the edge. And he
12 is a person that is not likely to learn from experience, which
13 basically goes to the point I think Mr. Jaramillo made in his
14 allocution on behalf of the victim, his daughter. That it's
15 highly unlikely in my view, given Dr. Scolatti's report and my
16 observations here, the testimony that's presented, that
17 Mr. Nielsen is likely to learn from this experience.

18 He has psychopathic traits that are in the high
19 range. He's on the borderline of being a psychopath. He has
20 poor judgment and apparently has no real consideration of the
21 long-term consequences of his actions.

22 There is a matter that is reflected I think in Dr.
23 Scolatti's report and elsewhere--and I'm not talking about
24 Mr. Donahoe. I'm talking about Mr. Nielsen. Implicit in all
25 of the things I've read, you get the sense that Mr. Nielsen

1 perceives that he's the one that's the victim and that he
2 really doesn't accept the responsibility for his actions,
3 although he said here that he's sorry.

4 He has some anger issues, and he has a persistent
5 and consistent sexual interest in prepubescent children. He is
6 in what Dr. Scolatti calls the problematic range. And the
7 other testing, although Dr. Scolatti's report indicates he does
8 not have an interest in hurting children, that is inconsistent
9 with the reality of what occurred here and the masochistic
10 behavior he demonstrated toward the 12-year-old victim in this
11 case.

12 Statistically, according to Dr. Scolatti, 80 percent
13 of the individuals who fall in the categories he falls in
14 reoffend violently within an average of ten years.

15 According to further testing, he's got a high level
16 of risk. He has an antisocial personality disorder and he has
17 two sexual classifications that are sadism, which is real, not
18 simulated. It's not something that goes on in his mind. It is
19 real. And then the pedophilia, which is the attraction to the
20 children. He's a poor candidate for rehabilitative treatment.

21 And when all of those things are considered, the
22 nature and circumstances of the offense and the history and
23 characteristics of the Defendant suggest that a very, very
24 significant upward variation from the Guidelines is appropriate
25 and reasonable in this case.

1 There is a need for the sentence imposed to reflect
2 the seriousness of the offense, to promote a respect for the
3 law and to provide just punishment for the offense.
4 Mr. Donahoe argues that the whole purpose of this is, in
5 essence, the need to punish. When we get in the '90s, this
6 kind of--the argument is these sex offenses that are being
7 prosecuted now weren't being prosecuted. And I think that's
8 true as it relates to the Internet use of child pornography.
9 But punishment isn't the only factor with Mr. Nielsen. I think
10 there is a significant need to protect the public.

11 The seriousness of the offense. It's a sad comment
12 on what we are as a society, that adult males can have the
13 lascivious attraction that they do to children. It's somehow
14 rationalized, when they are looking at sexually provocative and
15 explicit conduct of children on the Internet, that they are
16 just voyeurs, that they are just looking at it.

17 Mr. Nielsen has taken that situation to a completely
18 different level. Not only did he attract and entice this young
19 woman to come to Montana to engage in sex and drugs, but he did
20 so when she got here, having sexual intercourse with her five
21 and six times daily for the period that she was in his
22 apartment. His past experience, his convictions, his failure
23 to register, his difficulties with supervision all reflect that
24 William Richard Nielsen has very little respect for the law.

25 And I am sure that there are punishments that, if

1 this was in the 19th century, Mr. Nielsen would be looking at
2 much more severe consequences than what I am authorized to
3 impose here. But I do know that if I just consider the
4 seriousness of the offense and just punishment, again I'm
5 unconvinced that 20 years is sufficient. It's certainly not
6 greater than necessary and, in my view, a much higher sentence
7 is appropriate.

8 There is a need to afford adequate deterrence to
9 criminal conduct. I think Mr. Donahoe makes a legitimate
10 argument that the Government does have the power to seek civil
11 commitment of Mr. Nielsen whenever he is finished with his
12 term, and that may be an option that the Government seeks to
13 pursue. But I don't believe it's an argument that would deal
14 with the notion of specific deterrence.

15 Mr. Nielsen, based on all the information that's
16 before the Court, I think the way he is deterred is to
17 incapacitate him, and that means to lock him up in a facility
18 for an extremely long period of time just so that he does not
19 have the opportunity to engage in this kind of behavior in the
20 future.

21 As Dr. Scolatti said, he's got an antisocial
22 personality and he has borderline schizoid features. He's a
23 sadist, a masochist. He's callous. He's unconcerned about the
24 feelings of others. And he is not only impulsive, reckless and
25 irresponsible, he's irritable. And given all of those

1 characteristics, the deterrent I think that would keep him from
2 engaging in abusing children is to be locked up where he can't
3 get at children.

4 Specific deterrence I think is an extremely
5 important factor. I am uncertain what general deterrent a long
6 sentence may have, but it certainly may cause males in his age
7 group to think twice if they see the period of time he is going
8 to be locked up.

9 There is a need to protect the public from further
10 crimes by the Defendant for all of the reasons I've stated. I
11 think that the public is at great risk if he is not
12 incarcerated. He may be of an age by the time he gets out that
13 he may be incapacitated or uninterested, but a period of
14 lifetime supervised release for a repeat sex offender who has
15 no, in my view, legitimate or honest remorse about what he's
16 done, I believe that the public needs to be protected from him,
17 children need to be protected from him. And the most
18 significant way to deal with that, with a person who is not
19 likely to be subject to rehabilitation or treatment, is to
20 incarcerate him for a long period of time.

21 There is a need to provide him with educational,
22 vocational, medical or other correctional treatment in the most
23 effective manner. He has a drug problem. Perhaps he can
24 benefit from the RDAP program, but this factor is not of
25 significant consequence. Given the reports of the psychosexual

1 evaluation, it's unlikely he's going to be subject to any kind
2 of correctional treatment in any effective manner, certainly
3 not community treatment.

4 Vocational training I don't think is an issue, nor
5 is educational treatment. He does have some medical matters
6 that he's being treated for, but they are not significant
7 enough that it would require some special part of a sentence.

8 I have stated the kinds of sentences that are
9 available. The minimum is ten years. He could be sentenced up
10 to life. Supervised release can be no less than five years and
11 can be all the way up to life. There is a need to avoid
12 unwarranted sentence disparities among defendants with similar
13 records, found guilty of similar conduct. Mr. Nielsen stands
14 starkly alone in this District for the kind of behavior that he
15 has engaged in, so I don't think that's an issue.

16 Restitution. He's not likely to be able to pay it,
17 but I'm going to impose it because the law requires it.

18 Mr. Donahoe, if you and Mr. Nielsen would approach.

19 William Richard Nielsen, pursuant to the authority
20 vested in me by the Constitution of the United States and the
21 laws enacted by the United States Congress, as those have been
22 interpreted by the United States Supreme Court and the Ninth
23 Circuit Court of Appeals, it's my obligation to impose
24 sentencing on you.

25 I've considered a number of matters. This has been

1 a lengthy proceeding and I've stated all of the things that I
2 have considered.

3 I believe an upward variation under the factors set
4 forth in 3553(a), for the reasons I have stated, is
5 appropriate. I do not believe that a sentence within the
6 Advisory Guideline range of 235 to 293 months is sufficient.
7 And I think that a sentence of 480 months is a reasonable
8 sentence that is not greater than necessary.

9 Consequently, it is my judgment that you,
10 Richard--William Richard Nielsen, be committed to the custody
11 of the Bureau of Prisons for a term of 480 months.

12 I'm going to recommend that you be allowed to
13 participate in the residential sex offender treatment at a
14 facility designated by the Bureau of Prisons, if you are
15 eligible.

16 I'm also going to recommend that you participate in
17 the 500-hour residential treatment program for drugs and
18 alcohol.

19 When you leave prison, you'll be placed on
20 supervised release for the rest of your life. Within 72 hours
21 of your release by the Bureau of Prisons, you will report in
22 person to the probation office in the district to which you are
23 released. While you are on supervised release you are not to
24 commit another federal, state or local offense. You are barred
25 for the rest of your life from ever being in possession of any

1 kind of firearm, ammunition, or dangerous device as defined by
2 federal law. You are not to have any controlled substances,
3 including so-called medical marijuana.

4 You are going to have to cooperate in the collection
5 of DNA as directed by the United States Probation Office. And
6 you are going to have to submit to the sexually transmitted
7 disease testing that was a part of the plea agreement in this
8 case. And you will do that and abide by whatever the protocol
9 is for--in terms of bodily fluids and otherwise within the next
10 ten days.

11 You'll have to comply with the standard conditions
12 of supervised release. That will be--there are 15 of them.
13 You need to know them and follow them. You'll have to comply
14 with the following special conditions: When you get out,
15 you'll have to participate in and successfully complete a
16 program of substance abuse treatment as approved by the U.S.
17 Probation Office and you will continue in that until you are
18 relieved of the obligation by the Probation Office. You'll
19 have to pay for the treatment in whole or part, depending on
20 your ability to pay.

21 You'll have to participate in substance abuse
22 testing, and that will include not more than 104 urinalysis
23 tests and not more than 104 breathalyzer tests each year during
24 the balance of your life once you are released. You'll have to
25 pay for that breathalyzer and urinalysis testing in whole or

1 part, depending upon your ability to pay.

2 I am going to ban you from using alcohol for the
3 balance of your life. You'll have to abstain from the
4 consumption of alcohol and not enter any establishment where
5 alcohol is the primary item of sale. This condition supersedes
6 Standard Condition No. 7 with respect to alcohol only.

7 You are going to have to participate in a program
8 for mental health treatment, and that will include assessments
9 for anger control as deemed necessary by the Probation Office
10 and you'll stay in that program until you are relieved of that
11 obligation by your probation officer. And once again, it's
12 your obligation to pay for that in whole or part, depending on
13 your ability to pay.

14 I am going to require that you enter and complete a
15 sex offender treatment program as directed by, and until you
16 are released from it by the U.S. Probation Office. You will
17 have to abide by all of the policies of the program; and that
18 will include physiological testing, polygraph and the Abel
19 Assessment and any other requirements. You'll have to pay for
20 that treatment in whole or part, depending upon your ability to
21 pay.

22 Any employment that you obtain or seek must be
23 approved in writing in advance by the U.S. Probation Office,
24 and you'll have to consent to third-party disclosures of the
25 reasons that brought you here before the Court.

1 You are not going to be allowed to do any of the
2 following without the prior written approval of the United
3 States Probation Officer in charge of your case: Reside in the
4 home, residence or be in the company of any child under the age
5 of 18. Go to or loiter near school yards, parks, playgrounds,
6 arcades or other places primarily used by children under the
7 age of 18, or date or socialize with anyone who has children
8 under the age of 18.

9 You are not to possess any materials depicting
10 sexually explicit conduct as defined in 18 U.S. Code 2256(2)(a)
11 Roman i through v, including visual, auditory, telephonic or
12 electronic media, and computer programs or services. You are
13 not to patronize any place where such material or entertainment
14 is available. You are not to utilize 900 or adult telephone
15 numbers or any other sex-related numbers.

16 Mr. Nielsen, you are not to possess or use any
17 computer or other device with access to any online service
18 without the prior approval of the Probation Office. By online
19 service, that means the current technology.

20 The Defendant shall allow the probation officer to
21 make unannounced examinations of your computer, hardware,
22 software; and that may include retrieval and copying of any and
23 all data on that computer. You'll have to allow the Probation
24 Office to install software to restrict your access and to
25 monitor your access to any Internet or technologically

1 available source. You are not to possess any encryption or
2 stenography software. You'll have to provide records of all
3 passwords, Internet service and user identifications, past and
4 present, as well as future, to the Probation Office and you
5 must immediately report any changes. You are going to have to
6 sign releases that will allow the Probation Office to access
7 phone, wireless, Internet and utility records.

8 You are going to have to comply with the sex
9 offender registration requirements for convicted sex offenders
10 in any state in which you reside.

11 Mr. Nielsen, you are going to have to submit your
12 person, any property you have, house, residence, place of
13 employment, vehicle, papers, computers, and any other
14 electronic communication, data storage devices or media and
15 effects to search at any time with or without a warrant by any
16 law enforcement or probation officer who has a reasonable
17 suspicion concerning a violation of the conditions of your
18 supervised release or unlawful conduct by you. And you are
19 going to have to allow the probation officer, in the lawful
20 discharge of his supervisory functions, to have access to any
21 and all of those matters, including the search characteristic.

22 You are not to possess a police radio scanning
23 device or any computer hardware or software that would enable
24 you to track or monitor law enforcement activity. And you are
25 not to purchase, possess, use or distribute or administer

1 marijuana or obtain or possess a medical marijuana card. This
2 condition supersedes Standard Condition No. 7 with respect to
3 marijuana only.

4 You are going to have to pay restitution in the
5 amount of \$7,305 at a rate of not less than 10 percent of your
6 gross monthly income or as otherwise directed by the U.S.
7 Probation Office. And restitution in this case will be made as
8 directed in the Judgment to the persons named at the address
9 named in the Judgment. Payment will be made to the Clerk of
10 the U.S. District Court, P.O. Box 8537, Missoula, 59807. It
11 will then be disbursed to the individuals named in the
12 Judgment.

13 I find you don't have the ability to pay a fine, so
14 I'm not going to impose one. You do have to pay the special
15 assessment of \$100. That's due and payable immediately. If
16 you don't have the money to pay that today, you pay it through
17 the Inmate Financial Responsibility Act at the rate of not less
18 than \$25 per quarter.

19 Ms. Peterson, is there any legal reason why that
20 sentence should not be the judgment of the Court?

21 MS. PETERSON: No, Your Honor.

22 THE COURT: Mr. Donahoe, I know you've objected.
23 Other than your objections and the upward variation, is there
24 any legal reason why the sentence should not be the judgment of
25 the Court?

1 MR. DONAHOE: Your Honor, only because I don't
2 know--I just want to clarify my record that based on my
3 objections and I guess the complete record, we would argue that
4 the sentence is unreasonable.

5 THE COURT: Right. Now, I don't know what the
6 situation is, but as I read the presentence--or, excuse me, the
7 plea agreement, because you objected to the calculations there
8 has not been a waiver of appeal; is that correct?

9 MR. DONAHOE: Correct.

10 THE COURT: William Richard Nielsen, the sentence as
11 stated will be the judgment of the Court.

12 Now, Mr. Nielsen, you have a right to appeal my
13 legal determinations in the sentencing and the sentence that
14 was imposed. If you intend to appeal, you must file a written
15 Notice of Appeal within 14 days of today's date, and that must
16 be with the Clerk of the United States District Court for the
17 District of Montana. Do you understand that?

18 DEFENDANT: Yes, sir.

19 THE COURT: The reason I'm telling you that,
20 Mr. Nielsen, is that if you wanted to appeal any of those
21 issues that I mentioned or any others that relate to the
22 sentencing, if you don't file the Notice of Appeal in writing
23 on time, at the right place, then you are out of luck. You
24 lose, you waive, you give up the right to the appeal. Do you
25 understand that?

1 DEFENDANT: Yes, sir.

2 THE COURT: You have a right to ask the Court to
3 direct the Clerk to enter a Notice of Appeal on your behalf or
4 you can rely on Mr. Donahoe to perform that for you.

5 Do you want me to direct the Clerk to enter a Notice
6 of Appeal or do you want to rely on Mr. Donahoe?

7 DEFENDANT: Mr. Donahoe.

8 THE COURT: All right. That will be the judgment of
9 the Court.

10 And if there is nothing further, I'm going to remand
11 you to the custody of the Marshals. I am going to make, if it
12 hasn't been filed--is Dr. Scolatti's report a part of the
13 sealed record in the case?

14 MS. PETERSON: I don't believe it has been yet, Your
15 Honor, but I would request it.

16 THE COURT: It is going to be made a part of the
17 record. By sealing, it will be placed along with the Montana
18 Ninth Judicial District Court Findings of Fact and Conclusions
19 of Law and Dispositional Order. Those two items will be filed
20 under seal, accessible to counsel, and to nobody else without
21 an order of the court.

22 Thank you, Counsel. And we will be in recess.

23 (Court concluded at 1:29 p.m.)

24

25

C E R T I F I C A T E

[illegible]

I, Julie M. Lake, RDR, CRR, CSR, Freelance Court Reporter for the State of Montana, residing in Missoula, Montana, do hereby certify:

That I was duly authorized to and did report the proceedings in the above-entitled cause;

I further certify that the foregoing pages of this transcript represent a true and accurate transcription of my stenotype notes.

IN WITNESS WHEREOF, I have hereunto set my hand on
this the 8th day of August, 2011.

Julie M Lake
Julie M. Lake, RDR, CRR, CSR
Freelance Court Reporter
State of Montana, residing in
Missoula, Montana.